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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* January 29, 1992
Decided August 21, 1992

No. 90-5120

CRITICAL MASS ENERGY PROJECT, Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil No. 84-01943)

Paul R. Q. Wolfson, with whom *David C. Vladeck*, *Alan B. Morrison*, and *Eric R. Glitzenstein* were on the brief, for appellant.

Peter R. Maier, Attorney, U.S. Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, and *Leonard Schaitman*, Attorney, U.S. Department of Justice, and *John F. Cordes*, Solicitor, Nuclear Regulatory Commission, were on the brief, for federal appellee. *Carolyn F. Evans*, Attorney, Nuclear Regulatory Commission, also entered an appearance for federal appellee.

James D. Miller, with whom *Deborah J. Andrews* was on the brief, for appellee Institute of Nuclear Power Operations.

Janet L. McDavid was on the brief for *amicus curiae* The Business Roundtable, *urging affirmance*.

Before MIKVA, *Chief Judge*, and WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the court *en banc* filed by *Circuit Judge* BUCKLEY, in which *Circuit Judges* SILBERMAN, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH join.

Concurring opinion filed by *Circuit Judge* RANDOLPH, in which *Circuit Judges* SILBERMAN and SENTELLE join.

Dissenting opinion filed by *Circuit Judge* RUTH B. GINSBURG, in which *Chief Judge* MIKVA and *Circuit Judges* WALD and EDWARDS join.

BUCKLEY, Circuit Judge, with whom SILBERMAN, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*, join: Appellant seeks the release of certain reports that have been provided to the Nuclear Regulatory Commission by the Institute of Nuclear Power Operations on the understanding that they will be treated as confidential. In granting the petition to rehear the case *en banc*, we agreed to reconsider a seventeen-year-old decision, *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), in which we established a two-part test for determining when financial or commercial information in the Government's possession is to be treated as confidential under Exemption 4 of the Freedom of Information Act. We reaffirm the test but confine it to information that persons are required to provide the Government. We hold that where, as here, the information sought is given to the Government voluntarily, it will be treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public.

I. BACKGROUND

A. Legal Framework

When Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988), it "set[] forth a policy of broad disclosure of Government documents in order to ensure 'an informed citizenry, vital to the functioning of a democratic society.'" *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (citation omitted). At the same time, however, "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Id.* Balancing these private and public interests, Congress enacted nine exemptions to FOIA. Exemption 4, the provision at issue here, shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

In the years immediately following the enactment of FOIA, we had frequent occasion to put flesh on the exemption. *See, e.g.*, *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971); *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938-39 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). In *Sterling Drug*, we considered a FOIA request for records submitted to the Federal Trade Commission. In order to determine the purpose of Exemption 4, we examined the following passage from a Senate committee report:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

Sterling Drug, 450 F.2d at 709 (quoting S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964) ("Senate Report")). We

then concluded that the requested information was protected by the exemption because it was of "the type 'which would customarily not be released to the public by the person from whom it was obtained.' " *Id.*

Three years later, we decided *National Parks*. The plaintiff in that case sought disclosure of audits and other financial materials that the National Park Service required its concessioners to submit. We reversed the district court's grant of summary judgment in favor of the agency based on Exemption 4. After observing that the statute did not define "confidential," we noted that we had been guided, in earlier decisions, by the "would customarily not be released to the public" passage from the Senate Report. *National Parks*, 498 F.2d at 766. We found, however, that whether the person providing the information would customarily not have released it "is not the only relevant inquiry in determining whether that information is 'confidential.'. . . A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767. We then stated that "[i]n general, the various [FOIA] exemptions . . . serve two interests — that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy." *Id.*

We determined that Exemption 4 serves both of these purposes. As to the governmental interest, we noted that "[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the Government to make intelligent, well informed decisions will be impaired." *Id.* After discussing the legislative history, we concluded that "[t]his exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government[.]" *Id.* at 768 (quoting *Soucie*, 448 F.2d at 1078).

Turning to the private interests, we noted that the exemption "protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* We also recognized

> a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

Id. at 769. We concluded that the legislative history "firmly supports the inference that section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies which gather it." *Id.* at 770. We then offered what has come to be known as the *National Parks* "two-part test":

> [C]ommercial or financial matter is "confidential". . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted). At the same time, we reserved the question whether the impairment of other governmental interests might be implicated in the exemption. *See id.* at 770 n.17 ("We express no opinion as to whether other governmental interests are embodied in this exemption.").

On the facts of *National Parks*, we determined that, although the information being sought was customarily withheld from the public, "the Government ha[d] no apparent interest in preventing disclosure of the matter" as it was "supplied to the Park Service pursuant to statute." *Id.* at 770. We then held that

> [s]ince the concessioners are *required* to provide this financial information to the government, there is presumably no danger that public disclosure will *impair* the ability of the Government to obtain this information in the future[,]"

id. (emphasis in original), and remanded for further findings on the question of competitive harm. *See id.* at 770-71.

B. Facts and Proceedings Below

This case involves a dispute between Critical Mass Energy Project ("CMEP") and the Nuclear Regulatory Commission ("NRC") over access to safety reports prepared by the Institute for Nuclear Power Operations ("INPO") and voluntarily transmitted to the NRC on the condition that the agency will not release the information to other parties without INPO's consent. INPO was formed after the 1979 Three Mile Island accident to promote safety and reliability in the operation of nuclear power plants. INPO is a nonprofit corporation whose membership includes all operators of nuclear power plants in the United States.

One of INPO's principal programs is the Significant Event Evaluation and Information Network ("SEE-IN"), a system for collecting, analyzing, and distributing information concerning the construction and operation of nuclear facilities. Compilation of these reports requires the solicitation of candid comments and evaluations from nuclear power plant employees. The reports are distributed on a voluntary basis to INPO members, certain other participants in the nuclear industry, and the NRC pursuant to the explicit understanding that they are not to be disclosed to additional persons without INPO's consent.

In 1984, CMEP asked the NRC, pursuant to FOIA, to provide it with copies of the INPO reports. The NRC denied the request, finding that they contained con-

fidential commercial information and were therefore protected from disclosure by Exemption 4. CMEP then brought suit in district court challenging the NRC's determination.

District Judge Thomas Penfield Jackson granted the NRC's motion for summary judgment, concluding that the documents were both commercial and confidential and therefore exempt under section 552(b)(4) as interpreted by this court in *National Parks*. *See Critical Mass Energy Project v. NRC*, 644 F. Supp. 344, 346-47 (D.D.C. 1986). The judge acknowledged that while INPO itself was not subject to NRC regulation, its members were; therefore, the agency could compel them to produce the reports. Nevertheless, deeming it "preferable to have the INPO reports furnished to the NRC voluntarily, rather than delivered up under compulsion in circumstances less conducive to candor, accuracy, and timeliness," Judge Jackson held that "the NRC's ability to acquire the information imparted by the INPO reports will likely be impaired if it is not permitted to honor its commitment to INPO to keep them confidential." *Id.* at 347.

On appeal, a divided panel reversed and remanded for further proceedings. *Critical Mass Energy Project v. NRC*, 830 F.2d 278 (D.C. Cir. 1987) ("*Critical Mass I*"). We agreed that the information sought was commercial. With respect to the question of confidentiality, we held that the agency must meet two requirements: First, it must establish that the information sought "would customarily not be released to the public by the person from whom it was obtained" — a condition that the NRC had met in this case; and second, it must show that "disclosure [would] harm a specific interest that Congress sought to protect by enacting the exemption." *Id.* at 281 (citation omitted). We observed that *National Parks* had identified two of those interests: (1) the Government's need to have access to

commercial and financial data and (2) the provider's need to be protected from competitive harm. *Id.* at 281-82.

Applying the *National Parks* test, we agreed that the INPO reports were not "customarily released to the public," *id.* at 282, but found insufficient evidence that the Government's ability to secure the information would be impaired. *See id.* at 282-86. We concluded that to prove impairment, the NRC would have to show either that cessation of INPO's voluntary submission of the reports would deprive the NRC of the information they contained or that the employment of alternative means of obtaining the reports would create a significant risk that their value would be diminished. *Id.* at 283. We held that the NRC could not establish the first point, as the agency had ample authority to compel production of the INPO reports from its licensees, *id.* at 283-84, and remanded for further findings on the second. *Id.* at 286. We also held that the interests identified in *National Parks* (protection against governmental impairment and competitive injury) were not exclusive and instructed the district court to consider efficiency and effectiveness concerns in conducting its Exemption 4 analysis. *Id.* at 286-87.

After remand, INPO intervened in the litigation. Cross-motions for summary judgment were filed, and the district court granted the defendants' motion based on a determination that they had shown that release of the reports would harm the governmental interest in efficiency and cooperation with INPO. *See Critical Mass Energy Project v. NRC*, 731 F. Supp. 554, 557 (D.D.C. 1990).

On appeal, we rejected the district court's rationale but remanded for further findings on the effect of disclosure on the quality of the reports. *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 943-44, 947 (D.C. Cir. 1991) ("*Critical Mass II*"). In particular, we asked for "testimony from working-level employees regarding the

importance of confidential treatment of INPO reports to their willingness to speak to INPO analysts." *Id.* at 946.

Judge Randolph, joined by Judge Williams, wrote a separate concurring opinion. While recognizing that the court was bound by them, he questioned our decisions in *National Parks* and *Critical Mass I*. He was particularly critical of the two-part test announced in *National Parks* for having "added — or, as has been said, 'fabricated, out of whole cloth' — an additional requirement that must be met before confidential information is exempt from disclosure." *Id.* at 847 (quoting Note, *Trade Secrets and the Fifth Amendment*, 54 U. Chi. L. Rev. 334, 364 (1987)).

In response to petitions filed by the NRC and INPO, we vacated the opinion in *Critical Mass II* and ordered that the case be reheard *en banc*. *See Critical Mass Energy Project v. NRC*, 942 F.2d 799 (D.C. Cir. 1991). In granting the petitions, we undertook not only to reexamine the decisions in *Critical Mass I* and *II*, but also to "reconsider the definition of 'confidential' set forth in *National Parks* . . . for purposes of applying Freedom of Information Act Exemption 4." *Critical Mass Energy Project v. NRC*, No. 90-5120, Order (D.C. Cir. Oct. 4, 1991).

II. DISCUSSION

A. *National Parks* Reexamined

In challenging the definition of "confidential" presented in *National Parks*, the NRC and INPO ask us to set aside circuit precedent of almost twenty years' standing. In obedience to the principle of *stare decisis*, we reaffirm the definition but correct some misunderstandings as to its scope and application.

1. *Stare Decisis*

"[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494

(1987). The Supreme Court has held that "any departure from the doctrine . . . demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Furthermore, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction . . . [f]or here, unlike in the context of constitutional interpretation, . . . Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (citations omitted).

In *Patterson*, the Supreme Court articulated in some detail the circumstances in which it may find sufficient justification for overturning a statutory precedent:

> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision. . . .
>
> Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.

Id. at 173 (citations omitted).

Circuit courts of appeal, of course, play a different role in the federal system than the Supreme Court, and this is reflected in certain differences in the manner in which the principle of *stare decisis* is applied to circuit precedent. *See*

United States v. Aguon, 851 F.2d 1158, 1172-76 (9th Cir. 1988) (Reinhardt, J., concurring). Circuit courts do not establish the ultimate judicial precedent for the application of a federal statute; and because there are thirteen of them, they will at times interpret the same statute in different ways. Moreover, circuit precedent is generally established by the majority vote of just three circuit judges. Their decisions, nevertheless, bind the circuit "unless and until overturned by the court en banc or by Higher Authority." *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (Ginsburg, Ruth B., J., concurring).

Thus, in addition to considering the factors outlined in *Patterson*, a circuit court may reexamine its own established interpretation of a statute if it finds that other circuits have persuasively issued a contrary construction. An *en banc* court may also set aside its own precedent if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed. For example, in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*), we overturned a four-year-old precedent because we concluded that the rule established in that case was inconsistent with the intent of Congress and that the panel had misapplied a Supreme Court decision. *Id.* at 1524. *See also Groves v. Ring Screw Works, Ferndale Fastener Div.*, 111 S. Ct. 498, 501 n.8 (1990) (given intercircuit conflict and panel's doubt about correctness of circuit precedent, "it might have been appropriate for the panel to request a rehearing *en banc*"); *Aguon*, 851 F.2d at 1160-72 (*en banc*) (overruling circuit precedent in light of conflict with subsequent Second Circuit opinion).

Appellees NRC and INPO have failed to demonstrate any of the considerations that would justify our overturning the *National Parks* test. We note, first, the widespread acceptance of *National Parks* by other circuits. To date,

seven have adopted its test of confidentiality; none has rejected it. *See, e.g., 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Res. System*, 721 F.2d 1, 7-10 (1st Cir. 1983); *American Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Acumenics Research & Technology v. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) *General Elec. Co. v. NRC*, 750 F.2d 1394 1402-03 (7th Cir. 1984); *Pacific Architects and Engineers Inc. v. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936, 946 (10th Cir. 1990). Far from being overtaken by the tide of recent judicial developments, *National Parks*, it seems, has ridden its crest.

Nor have appellees pointed to any subsequent action in Congress that would tend to "remove[ ] or weaken[ ] the conceptual underpinnings" of *National Parks*. *Patterson*, 491 U.S. at 173. To the contrary, Congress has taken cognizance of the case in enacting subsequent legislation. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1153 n.146 (D.C. Cir. 1987) ("[W]hen both Houses of Congress provided an exemption [to the Government in the Sunshine Act] . . . they accepted the *National Parks* standard as appropriate."), *cert. denied*, 485 U.S. 977 (1988).

Finally, we find that *National Parks* has not proven so "unworkable" in practice as to constitute a "positive detriment to coherence and consistency in the law" or a "direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173. Nor has there been a showing that the test, as applied in *National Parks*, will frustrate Congress's purposes in enacting Exemption 4. Appellees argue, nevertheless, that the decision has proven unworkable in its everyday application by agencies and the courts. They suggest that the impracticability of the "governmental impairment" prong is evidenced by the history of this case. They claim similar

difficulties with the "competitive injury" prong. *See, e.g., Greenberg v. Food & Drug Admin.*, 803 F.2d 1213 (D.C. Cir. 1986) (reversing summary judgment for further proceedings on the economic effectiveness of other means of compiling private customer lists); *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (reversing summary judgment for further proceedings on question of discoverability of secret information sought by reverse engineering).

While these decisions illustrate the difficulties that can arise wherever judicial lines are drawn, they fall short of demonstrating that *National Parks* is so flawed that we would be justified in setting it aside. Moreover, we believe that the categorical rule we announce today will greatly simplify the application of Exemption 4 in a significant number of cases.

Having examined these and other arguments in favor of overturning *National Parks*, we conclude that none justifies the abandonment of so well established a precedent. Whatever our individual opinions as to the merits of its two-part test, we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that "[*s*]*tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

2. The *National Parks* test

The *National Parks* two-part test was presented as a summary of its discussion of Exemption 4. *See National Parks*, 498 F.2d at 770 ("To summarize . . . ."). The test must therefore be read in a manner consistent with the observations and conclusions that preceded it. We quote the most pertinent of these:

> [O]ur decisions concerning this exemption have been guided by the following passage from the Senate Report, particularly the italicized portion:
>
> > This exception is necessary to protect the confidentiality of information which is obtained by the Government . . ., *but which would customarily not be released to the public by the person from whom it was obtained.*

Id. at 766 (emphasis in original).

> The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. *Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.*

Id. at 767 (emphasis added).

> *Apart from encouraging cooperation with the Government by persons having information useful to officials*, [Exemption 4] serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.

Id. at 768 (emphasis added).

> [There is] a twofold justification for the exemption of commercial material: (1) *encouraging cooperation by those who are not obliged to provide information to the government* and (2) protecting the rights of those who must.

Id. at 769 (emphasis added).

In summarizing these various purposes and justifications, we formulated the now familiar two-part test that

defined as "confidential" any financial or commercial information whose disclosure would be likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770 (footnote omitted). In applying this test to the facts of *National Parks*, we held that because

> the concessioners [were] *required* to provide this financial information . . . , there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.

Id. (emphasis in original). Then, because the record was incomplete as to the competitive harm that might be suffered by the concessioners on the release of the information, we remanded for other findings on that question.

While we indicated that the governmental interest is unlikely to be implicated where the production of information is compelled, we have since pointed out that there are circumstances in which disclosure could affect the reliability of such data. *See Washington Post Co. v. HHS*, 690 F.2d 252, 268-69 (D.C. Cir. 1982) (possible effect of disclosure on accuracy of statements filed by consultants). Thus, when dealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible effect of disclosure on its quality.

When a FOIA request is made for information that is furnished on a voluntary basis, however, we have identified a different aspect of the governmental interest in securing confidential information. As is apparent from the language we have italicized in the passages quoted above, the purpose served by the exemption in such instances is that of "encouraging cooperation with the Government by persons having information useful to officials," *National*

Parks, 498 F.2d at 768. Moreover, we have taken note of the probable consequences of a breach of confidence by the Government:

> Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the government to make intelligent, well informed decisions will be impaired.

Id. at 767. Thus, when information is obtained under duress, the Government's interest is in ensuring its continued reliability; when that information is volunteered, the Government's interest is in ensuring its continued availability.

A distinction between voluntary and compelled information must also be made when applying the "competitive injury" prong. In the latter case, there is a presumption that the Government's interest is not threatened by disclosure because it secures the information by mandate; and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA's presumption of disclosure, that interest must be significant. Where, however, the information is provided to the Government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation. In those cases, the private interest served by Exemption 4 is the protection of information that, for whatever reason, "would customarily not be released to the public by the person from whom it was obtained" — to use the formulation adopted by this court in *Sterling Drug*, 450 F.2d at 709 (quoting Senate Report at 9). Because *Critical Mass I* failed to take these distinctions into account, its holding would frustrate Congress's purpose of "encouraging cooperation with the Government by persons having information useful to officials," *National Parks*, 498 F.2d at 768. *See Critical*

Mass I, 830 F.2d at 288 (Buckley, J., concurring in part and dissenting in part); *Critical Mass II*, 931 F.2d at 948 (Randolph, J., concurring).

It should be evident from this review that the two interests identified in the *National Parks* test are not exclusive. Although we overrule our decision in *Critical Mass I*, we note that the panel there adopted the First Circuit's conclusion that the exemption also protects a governmental interest in administrative efficiency and effectiveness. *See Critical Mass I*, 830 F.2d at 286 (citing *9 to 5 Org. for Women Office Workers*, 721 F.2d at 11). And today, of course, we recognize a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis. We offer no opinion as to whether any other governmental or private interest might also fall within the exemption's protection.

B. Application of Exemption 4 to Information Provided on a Voluntary Basis

The Supreme Court has encouraged the development of categorical rules whenever a particular set of facts will lead to a generally predictable application of FOIA. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). The Court emphasized that

> *establishing a discrete category of exempt information*, [will] implement[ ] the congressional intent to provide "workable" rules. . . . Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered.

Id. at 779 (quoting *FTC v. Grolier, Inc.*, 462 U.S. 19, 27-28 (1983) (emphasis in original)). We also take cognizance of the Court's "practical approach when . . . confronted with

an issue of interpretation of [FOIA]." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989).

The circumstances of this case lend themselves to categorical treatment. It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release. Accordingly, while we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

We make three observations about this test. First, it is objective. As is the case with any claim under FOIA, *see* 5 U.S.C. § 552(a)(4)(B) (1988), the agency invoking Exemption 4 must meet the burden of proving the provider's custom. Second, we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently had this test been applied. Finally, in defining the limits of the *National Parks* confidentiality test, we do not repudiate any part of our holding in that case. A respect for *stare decisis* does not require the most expansive application of principles enunciated in a prior decision. To the contrary,

> [i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with

> care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821). *See also United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring).

Applying this rule to the INPO reports, we agree with the district court's conclusion that the information they contain is commercial in nature; that the reports are provided to the NRC on a voluntary basis; and that INPO does not customarily release such information to the public. *See Critical Mass*, 644 F. Supp. at 346-47 and n.5; *see also Critical Mass I*, 830 F.2d at 280-81. On the basis of these findings, we hold that the INPO reports are confidential within the meaning of Exemption 4 and therefore protected from disclosure.

CMEP asserts that the test we announce today may lead government agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information that the agency has the power to compel. CMEP alleges that the NRC had in fact planned to impose greatly expanded mandatory reporting requirements on its licensees until INPO undertook to manage the voluntary reporting system they would have replaced and to provide the NRC with access to the information generated by it. *See* Brief for Appellant at 37-39.

We know of no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act. Nor do we see any reason to interfere with the NRC's exercise of its own discretion in determining how it can best secure the information it needs. So long as that information is provided voluntarily, and so long as it is of a kind that

INPO customarily withholds from the public, it must be treated as confidential.

III. CONCLUSION

Having found none of the special circumstances that would justify overturning a precedent of such long standing, we reaffirm the two-prong test in *National Parks*. As a practical matter, however, we confine it to the category of cases to which it was first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government. We also hold that Exemption 4 protects any financial or commercial information provided to the Government on a voluntary basis if it is of a kind that the provider would not customarily release to the public.

Accordingly, we vacate our decision in *Critical Mass I* and affirm the district court's grant of summary judgment in favor of the NRC. To the extent that any of our other precedents may be read as inconsistent with our decision today, they are to that degree overruled.

So ordered.

RANDOLPH, *Circuit Judge*, with whom SILBERMAN and SENTELLE, *Circuit judges*, join, *concurring*: While I continue to believe, for the reasons previously given, *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), that the test announced in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), incorrectly interpreted Exemption 4 of the Freedom of Information Act, 931 F.2d at 947-48, I am persuaded that *stare decisis* counsels against overruling National Parks.

The Supreme Court rarely overrules its decisions construing statutes. *Stare decisis* is considered "most compelling" in such cases (*Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 565 (1991)). If the Court's interpretation of a statute is perceived as inaccurate or undesirable, legislative modification is possible. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986), citing, *inter alia*, Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 540 (1948). Congress' enactment of 28 U.S.C. § 1367 in response to *Finley v. United States*, 490 U.S. 545 (1989), illustrates as much. Other examples, gathered by the diligent research of Professor Eskridge, are collected in his article *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991), which lists congressional "overrides" of 121 Supreme Court statutory interpretation decisions from 1967 to 1990. *Id.* at 338 (Table 1). This is not to suggest that Congress acts only in response to judicial mistakes; or that a later Congress might not actually prefer a court's misinterpretation; or that legislative revision is always politically feasible. It is just the possibility of a congressional override that the Supreme Court has deemed important. That possibility, and the consequent force this adds to *stare decisis*, pertain as well to the federal courts of appeals. Statutes overriding interpretations rendered by the inferior federal courts are not uncommon. Professor

Eskridge cites 220 lower federal court decisions during the same period that met this fate. *Id.*

The federal appellate courts, however, are obviously not in the same position as the Supreme Court. We do not have the last judicial word on the meaning of legislation. Our statutory interpretations are subject to correction, not only by Congress, but also by the Supreme Court. Before Supreme Court review or congressional action, disagreements among the courts of appeals may develop. There is evidence that the extent of unresolved conflicts is considerable. A. HELLMAN, UNRESOLVED CIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM, at v (Final Report, Phase I, Dec. 1991) (prepared pursuant to Congress' request in section 302 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089). This seems inevitable. We now have potentially more than 6,000 different panels from thirteen circuits handing down tens of thousands of decisions each year.* Yet, in theory at least, the federal

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* The numbers play out as follows:

CIRCUIT	NUMBER OF JUDGES	POSSIBLE PANELS
D.C. Cir.	12	220
1st Cir.	6	20
2d Cir.	13	286
3d Cir.	14	364
4th Cir.	15	455
5th Cir.	17	680
6th Cir.	16	560
7th Cir.	11	165
8th Cir.	11	165
9th Cir.	28	3,276
10th Cir.	12	220
11th Cir.	12	220
Fed. Cir.	12	220
TOTAL	179	6,851

The tally uses the number of judges currently authorized by Congress for each circuit. *See* 28 U.S.C. § 44.

courts constitute one judicial system; to use Hamilton's phrase, when it comes to applying federal law we are parts of "ONE WHOLE." THE FEDERALIST No. 82, at 556 (A. Hamilton) (J. Cooke ed. 1961). I therefore believe that when there is a conflict among the circuits over the construction of a statute, a federal appellate court — sitting *en banc* — should reexamine its position, rather than simply adhere to circuit precedent, right or wrong. *Cf.* D.C. Cir. R. 15(a)(c). This reason for relaxing the force of *stare decisis* does not, however, apply here. As Judge Buckley's opinion for the court points out, seven other circuits have adopted the *National Parks* test; none has rejected it. We also are not faced today with the question of how much weight an *en banc* court should give to a recent ruling, made by a single panel, not yet interpreted, and applied by several subsequent panels.

Yet there is considerable space, I think, between overruling a decision and pressing forward with it for all it is worth. The factors recited above, and in the opinion of the court, counsel against the former. But nothing in the doctrine of *stare decisis* requires a court to go further. The risks of doing so have been well-stated by Justice Scalia, and his description deserves full quotation:

> Once . . . the scope of a statute [is expanded] beyond a reasonable interpretation of the language, [later cases] . . . press[ ] the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute. Some distance down that

> path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic.

NLRB v. International Bd. of Elec. Workers, 481 U.S. 573, 597-98 (1987) (Scalia, J., concurring); *see also Critical Mass Energy Project v. NRC*, 830 F.2d 278, 287-88 (D.C. Cir. 1987) (Buckley, J., concurring in part and dissenting in part).

The court's opinion today halts our progression down the path, and ensures that future decisions about these issues will be guided primarily by reference to the Act, not to *National Parks*. For that reason, and out of respect for the doctrine of *stare decisis*, I join the opinion of the court.

RUTH B. GINSBURG, *Circuit Judge*, joined by MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*, dissenting from the court's opinion: Our prior dispositions in this case closely followed and "[d]id not expand upon *National Parks [and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)]." *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 948 (D.C. Cir. 1991) (Randolph, J., concurring). Recognizing, as does the full court, that *stare decisis* is wise policy, particularly in cases of this sort, and that appellees have not shown cause to dislodge that sound policy, *see* majority opinion (maj. op.) at 9-12, I would preserve our *National Parks* precedent.

The court, instead, removes from the governance of *National Parks* all cases in which commercial or financial information is given to the Government voluntarily. The cutback substantially revises the law of this circuit and diminishes as well sister circuit case law patterned on our *National Parks* decision. *Stare decisis*, though protractedly addressed, has not been appropriately observed in today's decision. Nor has the guiding purpose of the Freedom of Information Act (FOIA) — to shed light on an agency's performance of its statututory duties — been well served by the en banc disposition. I therefore dissent from the court's FOIA and precedent unsettling judgment and opinion.

I.

The court in *National Parks* sought to define "confidential" as that word is used in FOIA exemption 4, covering

> . . . commercial or financial information obtained from a person and . . . confidential . . . .

5 U.S.C. § 552(b)(4). The definition that *National Parks* opinion author Judge Tamm developed for the court was designed to control both information voluntarily submitted and information a person is obliged to supply to the

Government. At the outset of the opinion, Judge Tamm indicated that defining "confidential" for exemption 4 purposes was the court's first task, and he reaffirmed what circuit precedent already made clear: "the test for confidentiality is an objective one"; objectivity requires the court to press beyond the inquiry "[w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained." *National Parks*, 498 F.2d at 766, 767;[1] *see Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.) (instructing that FOIA's "statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny," and stressing district court's responsibility, in the first instance, to insure that exemption 4 "is strictly construed in light of the legislative intent"), *cert. denied*, 400 U.S. 824 (1970).

The court today asserts that its revision of the *National Parks* test "is objective." Maj. op. at 17. That is true to the extent that my colleague demand more than the stamp-mark "Confidential" to shield a document: the provider must have a confidentiality custom and the agency must prove that custom.[2] But the court's slackened test is not

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[1] Later in the *National Parks* opinion, Judge Tamm restated:

> The district court concluded that th[e] information [requested] was of the kind "that would not generally be made available for public perusal." . . . [W]e do not think that, by itself, . . . supports application of the financial information exemption. The district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

498 F.2d at 770 (footnote omitted).

[2] The court leaves unaddressed whether, as here, the custom must prevail in the industry or may be simply the provider's unique practice. *Cf.* H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 18 (1978) (rejecting as clearly inappropriate the withholding of "all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests for information").

"objective" in the sense vital to Judge Tamm's reasoning in *National Parks*. No longer is there to be an independent judicial check on the reasonableness of the provider's custom and the consonance of that custom with the purposes of exemption 4 and of the Act of which the exemption is part. To the extent that the court allows providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed "subjective" and substantially departs from *National Parks*.

Judge Tamm's opinion in *National Parks* recounts the relevant legislative history first to explain why Congress provided an exemption for "commercial" material, and next to describe what it takes to warrant classification of "commercial" material as "confidential." 498 F.2d at 669-70. Regarding the former, Congress recognized "a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must." *Id.* at 769. Concerning the key word "confidential," *National Parks* summarizes:

> [C]ommercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted). The court left open the possibility that "other governmental interests" might also be protected by the exemption. *See id.* at 770 n. 17 (mentioning "problems of compliance and program effectiveness"); *see also* maj. op. at 15-16.

Not until he had thus summarized alternative tests for determining when commercial matter is "confidential," without distinguishing between voluntary and required submissions, did Judge Tamm turn to the application of his formula to the information at issue in *National Parks*: financial records (including audits and annual financial statements) of companies operating concessions in national parks. Judge Tamm then stated: "Since the concessioners are *required* to provide th[e] financial information to the [Park Service], there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future." 498 F.2d at 770 (emphasis in original).[3] This statement strongly suggests that the "impairment" test, given equal billing by the *National Parks* court, was comprehended by that court as having its principal utility in cases of information voluntarily submitted.

National Parks has by now figured as the leading decision in many cases in which information was furnished to the Government *voluntarily*. *See, e.g., 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983) (remanding for district court determination whether exemption 4 shields information); *Wiley Rein & Fielding v. U.S. Dep't of Commerce* 782 F. Supp. 675 (D.D.C. 1992) (holding documents unprotected by exemption 4); *Durnan v. U.S. Dep't of Commerce*, 777 F. Supp. 965 (D.D.C. 1991)

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[3] We have recognized and described, more recently, a qualitative aspect to the impairment test formulated in *National Parks*. Even when the Government requires submission of information, it may justify nondisclosure under exemption 4 by showing that the quality or reliability of the material provided would be so diminished by the prospect of public disclosure as to "seriously impair" the Government's information-gathering ability. *See* Washington Post Co. v. HHS, 865 F.2d 320, 325-28 (D.C. Cir. 1989); maj. op. at 14-15.

(holding information exempt); *Klayman & Gurley v. U.S. Dep't of Commerce*, 1990 U.S. Dist. LEXIS 4329 (D.D.C. Apr. 17, 1990) (holding information exempt); *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990) (holding information nonexempt); *ISC Group, Inc. v. U.S. Dep't of Defense*, 1989 U.S. Dist. LEXIS 5763, 35 Cont. Cas. Fed. (CCH) ¶ 75,667 (D.D.C. May 22, 1989) (holding information exempt). In no decision prior to today's ruling has any court suggested that the *National Parks* definition of "confidential" is good for required submissions only.[4] In short, the court's asserted "obedience" to *stare decisis*, *see* maj. op. at 9, is a "sometimes thing."

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[4] The court gives less than the full picture when it asserts that "we know of no case considered *by this court* in the past, other than *Critical Mass I* and *II*, that would have been decided differently had [the new] test been applied." Maj. op. at 17 (emphasis added). *But cf.* 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1 (1st Ct. 1983). The fact is, we have had rather few cases concerning voluntarily submitted information. In light of today's decision, however, more cases may be headed our way. *See, e.g.*, Teich v. Food and Drug Administration, 751 F. Supp. 243 (D.D.C. 1990). In *Teich*, the FDA maintained that voluntarily submitted animal test results and consumer complaint surveys concerning silicone breast implants were protected from FOIA disclosure by exemption 4. Applying *National Parks*, the district court first rejected the FDA's contention that disclosure would impair the government's ability to gather information:

> It may be true that the disclosure of documents submitted voluntarily will impair voluntary cooperation. However, where compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced.

Id. at 251. The *Teich* court next rejected the FDA's argument that release of the studies would cause the provider competitive injury. *Id.* at 253. The documents sought in *Teich* reflected unfavorably upon the submitter's product — just the sort of information a company would not customarily disclose. The *National Parks* test, as framed by Judge Tamm, may have discouraged an appeal in *Teich*; today's decision invites insistent appeal under exemption 4 in similar cases.

II.

The surgery done on *National Parks* might have been less questionable had that decision fundamentally misunderstood the legislative will or generated disagreement among the circuits. But the court forthrightly acknowledges that no such flaw marred *National Parks*. *See* maj. op. at 11-12. Thus the court's new exemption 4 test, devised for voluntary submissions, is all the more difficult to reconcile with Congress' unmistakably clear direction: "The mandate of the FOIA calls for broad disclosure of Government records," *CIA v. Sims*, 471 U.S. 159, 166 (1985) (footnote omitted), and "for this reason . . . FOIA exemptions are to be narrowly construed." *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act") (footnote omitted), *cert. denied*, 415 U.S. 977 (1974); *see also Washington Post Co. v. HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989) ("Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute.").

Under the test announced today, "financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Maj. op. at 17. No longer is it necessary to show in each case "how disclosure will significantly harm some relevant private or governmental interest." *See 9 to 5 Organization for Women Office Workers*, 721 F.2d at 12 (Breyer, J., dissenting). Henceforth, in this circuit, it will do for an agency official to agree with the submitter's ascription of confidential status to the information. There will be no objective check on, no judicial review alert to, "the temptation of government and business officials to

follow the path of least resistance and say 'confidential' whenever they seek to satisfy the government's vast information needs." *Id.*[5] Under the regime replacing *National Parks*, "the exemption [will] expand beyond what Congress intended." *Id.*

But the court sees virtue in a categorical rule, *see* maj. op. at 16, and such rules do have a place in FOIA's domain. "Categorical balancing" won favor, for example, in *U.S. Dep't. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989). The Court there held criminal rap sheets categorically exempt from disclosure under exemption 7(C) because the "basic policy" of FOIA, which focuses on the citizens' right to be informed about 'what their government is up to' . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773. Similarly, the Court ruled in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), that witness statements in pending unfair labor practice proceedings are categorically exempt from pre-hearing disclosure under exemption 7(A) because the "basic purpose of FOIA . . . to ensure an informed citizenry" would not "be defeated by deferring disclosure until after the Government ha[d] 'presented its case in court.' " *Id.* at 242 (footnotes and citations omitted).

A categorical approach, however, is not in order across the board under FOIA, without regard to the character of the information requested. Such an automatic approach is not suitable for judging the wide range of cases presenting

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[5] The Nuclear Regulatory Commission has conceded that it has "ample statutory authority . . . . to compel the production" of the information sought here. Critical Mass Energy Project v. NRC, 830 F.2d 278, 284-85 (D.C. Cir. 1987).

contests under exemption 4. That was Judge Tamm's essential point in *National Parks*. This case is illustrative.

Critical Mass Energy Project seeks access to comprehensive reports, prepared by a consortium comprised of the entire nuclear utility industry, concerning the causes and potential hazards of "significant" safety-related events at nuclear power plants. *See Critical Mass Energy Project v. NRC*, 830 F.2d 278, 279-80 (D.C. Cir. 1987). Disclosure of these reports, and the response of the Nuclear Regulatory Commission (NRC) to the information contained in them, would undoubtedly shed light on the character and adequacy of the Commission's pursuit of its mission to "encourage . . . the development and utilization of [nuclear] energy for peaceful purposes to the maximum extent consistent . . . with the health and safety of the public." 42 U.S.C. § 2013(d). The FOIA request we face seeks no "information about private citizens that happens to be in the warehouse of the Government"; disclosure is sought "not primarily in the commercial interest of the requester," but to advance public understanding of the nature and quality of the NRC's oversight operations or activities. *See Reporters Committee for Freedom of the Press*, 489 U.S. at 774, 775 (emphasis in original) (internal quotation omitted). "[T]he public interest that the FOIA was enacted to serve," *see id.* at 775, is thus centrally at stake.

FOIA creates "a judicially enforceable public right to secure . . . information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1965). Congress understood that it is no

> easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all

> interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *EPA v. Mink*, 410 U.S. at 80 n.6). The *National Parks* formulation fits the congressional design better than the virtual abandonment of federal court scrutiny approved by the court today for Government withholding of commercial or financial materials submitted voluntarily. For that reason, I dissent from the court's decision to overrule, in significant measure, our *National Parks* precedent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5120

September Term, 1991

CRITICAL MASS ENERGY PROJECT, Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

D. C. Civil No. 84-01943

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court en banc, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
CLERK

Date: August 21, 1992

Opinion for the Court filed by Circuit Judge Buckley.

Concurring opinion filed by Circuit Judge Randolph, in which Circuit Judges Silberman and Sentelle join.

Dissenting opinion filed by Circuit Judge Ruth B. Ginsburg, in which Chief Judge Mikva and Circuit Judges Wald and Edwards join.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRITICAL MASS ENERGY PROJECT, Plaintiff,

v.

NUCLEAR REGULATORY COMMISSION, Defendant.

D. C. Civil Action No. 84-1943

Sep. 26, 1986.

MEMORANDUM AND ORDER

This Freedom of Information Act ("FOIA")[1] case is before the Court on the parties' cross-motions for summary judgment. The material facts are undisputed, and the single issue of law before the Court is whether certain reports now given to the defendant agency by a non-party upon the former's promise not to divulge them are exempt from disclosure under FOIA as confidential commercial information. For the reasons set forth below, the Court concludes that the reports are exempt and will deny plaintiff's and grant defendant's motions for summary judgment, and dismiss the amended complaint with prejudice.

I.

Plaintiff Critical Mass Energy Project ("CMEP"), a non-profit consumer organization, seeks copies of various reports supplied by the Institute of Nuclear Power Operations ("INPO") to the Nuclear Regulatory Commission

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[1] 5 U.S.C. § 552 (1982).

("NRC"), the federal agency that regulates and licenses the construction and operation of commercial nuclear power plants in the United States.[2] INPO, also a non-profit corporation, is a consultative association established by the nuclear electric utility industry in 1979 in the wake of the Three Mile Island accident, and has as its members all 55 utility companies now producing domestic nuclear power. As one of its services to its members, INPO conducts "peer reviews" of their operations, and prepares reports of its analyses and recommendations with respect thereto. Some of the reports concern "events" with safety implications.[3]

Pursuant to a Memorandum of Agreement it reached with the NRC in April of 1982, INPO now routinely, and voluntarily, furnishes copies of its reports to the NRC, on condition, however, that the NRC not release them to others without INPO's consent. In January, 1984, CMEP made its FOIA request of NRC for copies of the INPO reports, which the NRC denied, INPO not consenting, on the ground that they were exempt from disclosure as confidential commercial information. This action for injunctive relief followed.

II.

Congress has exempted from disclosure under FOIA a category of information known as "trade secrets and commercial or financial information obtained from a per-

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[2] CMEP's amended complaint also included a count seeking access to the advisory process between INPO and the NRC under the Federal Advisory Committee Act, 5 U.S.C. app. I (1982). The parties reached a settlement resulting in the dismissal of that count.

[3] Much of the factual "event" information contained in the reports is already available to the public; the NRC independently requires its licensees to report similar information to it directly, and the information derived from licensees is concededly disclosable under FOIA.

son and privileged or confidential." 5 U.S.C. § 552(b)(4) (1982).[4] The NRC does not contend that the INPO reports are trade secrets or financial information or that they are privileged, but, rather, that they are "commercial information" and are "confidential" within the meaning of the exemption.

The Court of Appeals for the District of Columbia Circuit has held that the word "commercial" is to be given its ordinary meaning when read in conjunction with FOIA. *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Thus, information is commercial if it relates to commerce, *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978), or it has been compiled in pursuit of profit. *See Public Citizen*, 704 F.2d at 1290. CMEP argues that the INPO reports cannot be commercial, because INPO itself is a not-for-profit entity. The argument, however, is too categorical. While a factor to be considered, INPO's non-profit status is not by itself determinative. *See American Airlines*, 588 F.2d at 870. And INPO's constituent utility companies are assuredly commercial enterprises engaged in the production and sale of electrical power for profit. The revelation of the details of the operations of their nuclear power plants, whether in critical or laudatory contexts, could materially affect their profitability in multiple ways. The Court concludes that the INPO reports must be deemed to be "commercial" information in all relevant senses of the word.

For the reports to be exempt from disclosure, however, they must not only contain "commercial" information but be "confidential" as well. Information is said to be

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[4] It is undisputed that the INPO reports are "obtained from a person," private associations and corporations having been defined as "persons" under FOIA. 5 U.S.C. § 551(2); *Gulf and Western Industries v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979).

"confidential" if it is customarily not released to the public by the person from whom the government obtains it, *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 404 (D.C. Cir 1980), and if nondisclosure is justified by the legislative purpose underlying the exemption. *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) ("*National Parks I*").[5] That legislative purpose is to permit an agency to withhold information acquired from non-governmental sources which is necessary to its mission if its disclosure is likely either to impair the government's ability to obtain such information in the future or to cause substantial harm to the competitive position of its source. *National Parks I*, 498 F.2d at 770. The test is an objective one, however; the government's promise of confidentiality alone is not dispositive. *Washington Post Co. v. Department of Health and Human Services*, 690 F.2d 252, 268 (D.C. Cir. 1982).

NRC does not maintain that release of the reports will compromise anyone's competitive position, and CMEP does not doubt that the NRC finds the INPO reports necessary to its functions in the sense of being useful.[6] CMEP disputes, however the assertion that divulging them pursuant to FOIA would impair NRC's ability to get them

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[5] Although INPO does not make its reports generally available to the public, CMEP notes that the reports are sent to the utility companies themselves, and occasionally to industry consultants, contractors, and certain vendors; in short, to nearly everyone who may be interested except the public-at-large. The affidavit of the Director of the Communications Division of INPO states, however, that the instances in which reports are made available to non-members of INPO are the exceptions rather than the rule.

[6] The Court of Appeals has held that "necessary" information must be sufficiently important to the carrying out of the government's functions. *See Washington Post Co. v. Department of Health and Human Services*, 690 F.2d 252 (D.C. Cir. 1982).

(or their substance) in the future. The NRC already receives the same data its members send to INPO directly from the utilities themselves, the utilities being required to provide it as a condition of being licensed, and the INPO reports merely interpret and analyze that data, a task that CMEP says NRC could do for itself. Moreover, it says, NRC could simply subpoena the INPO reports, or adopt regulations requiring their submission by INPO's licensee-members if INPO resists.

But INPO itself is not a licensee. It is a voluntary membership organization of licensees, formed for the purposes of exchanging knowledge and experience with one another, and of rendering consensus judgments upon matters relating to the safe and efficient operation of nuclear power plants generally. INPO is not regulated by the NRC, and is under no legal obligation to report anything to the NRC, or even to prepare reports at all. It is fully autonomous, and could abandon its peer review process altogether, or disband entirely as easily as it came into existence.

It is clearly important for the NRC's purposes that INPO continue to be a forum for industry introspection and that it continue to make reports of the results of that process. It is also important that the NRC continue to receive the reports. Even assuming that the NRC is, in fact, capable of generating the substance of the reports on its own, and leaving aside all considerations of the time required for and cost to it to do so, it is nevertheless of considerable value to the NRC to be privy to the industry's own contemporaneous collective insights on problems of common — indeed, universal — concern, which is what it now obtains from INPO by way of its reports. And it is preferable to have the INPO reports furnished to the NRC voluntarily, rather than delivered up under compulsion in circumstances less conducive to candor, accuracy, and timeliness. The Court finds that the NRC's ability to

acquire the information imparted by the INPO reports will likely be impaired if it is not permitted to honor its commitment to INPO to keep them confidential, and concludes that they are exempt from disclosure under FOIA.

For the foregoing reasons, therefore, it is, this 26th day of September, 1986,

ORDERED, that plaintiff's motion for summary judgment is denied; and it is

FURTHER ORDERED, that defendant's motion for summary judgment is granted, and the amended complaint is dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5647

CRITICAL MASS ENERGY PROJECT, Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 84-1943)

Argued May 8, 1987

Decided Sept. 29, 1987

Eric R. Glitzenstein, with whom *David C. Vladeck* and *Alan B. Morrison* were on the brief, for appellant.

Peter R. Maier, Attorney, U.S. Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *Leonard Schaitman*, Attorney, U.S. Department of Justice, were on the brief, for appellee.

Before RUTH BADER GINSBURG, BUCKLEY, and D. H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RUTH B. GINSBURG.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* BUCKLEY.

GINSBURG, RUTH B., *Circuit Judge*: In this Freedom of Information Act (FOIA) case, plaintiff Critical Mass Energy Project (CMEP) seeks access to reports prepared by a utility industry consortium and voluntarily transmitted to the Nuclear Regulatory Commission (NRC or Commission). The district court granted the NRC's motion for summary judgment, holding that the reports in question could be withheld pursuant to 5 U.S.C. § 552(b)(4), FOIA's exemption for confidential, commercial information.[1] Because the NRC has not established on the current record that exemption (b)(4) shelters the disputed reports, we vacate the judgment in the NRC's favor and remand the case for further proceedings.

I.

The Institute for Nuclear Power Operations (INPO) was formed in the aftermath of the Three Mile Island accident to promote, in the NRC's words, "improved safety and reliability in the operation of commercial nuclear power plants through a program of self-regulation by peer review."[2] All 55 utility companies that operate or construct nuclear power plants in the United States are members of INPO, and finance its operations by their membership assessments.[3]

As part of its "SEE-IN" (Significant Event Evaluation and Information Network) Program, INPO periodically produces three types of reports: Significant Event Reports (SERs), Significant Operating Experience Reports (SOERs), and Operation & Maintenance Reminders (O & MRs). SERs are produced whenever INPO deter-

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[1] Memorandum and Order, C.A. No. 84-1943 (D.D.C. Sept. 26, 1986), *reprinted in* Joint Appendix (J.A.) at 284-90.

[2] Brief for the Appellee at 4-5.

[3] *Id.* at 5 & n. 2.

mines, on the basis of information provided to it primarily by its member utilities,[4] that a "significant"[5] safety-related event has occurred at a nuclear power plant. The SER describes the event and its "possible causes and effects" in detail, and sets out "INPO's candid and critical analysis of the problems identified."[6] SOERs contain more detailed follow-up analyses of these significant events, with more wide-ranging, generic recommendations concerning plant construction, design, and operation.[7] O & MRs concern operating problems deemed not significant enough to warrant the searching analysis included as part of the SERs and SOERs; O & MRs "generally describe operating or maintenance difficulties encountered in specific nuclear plants and discuss the means used to solve the problems."[8]

These reports, the focus of CMEP's FOIA request, are provided by INPO, at its expense, to the NRC under a 1982 Memorandum of Agreement. All INPO members and "participants,"[9] as well as the Nuclear Safety Analysis

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[4] *See infra* pp. 13-14 for a more detailed account of INPO's information sources.

[5] Determination that an event is "significant" is based upon INPO-developed screening criteria. *See* Defendant's Answers to Plaintiff's Interrogatories ¶ 4(A), J.A. at 20.

[6] Brief for the Appellee at 7.

[7] *Id.* at 7-8.

[8] *Id.* at 8 n. 6.

[9] "[INPO] presently has 13 international participants and 13 supplier participants. The international participants consist of utility organizations that operate or are constructing nuclear power plants in other countries. The supplier participants consist of nuclear steam supply system vendors and major architect[,] engineering or construc-

(continued...)

Center and the Nuclear Electric Insurance Limited,[10] receive copies of the reports. Outside consultants and contractors may receive copies "where necessary in order to make appropriate use of the report, *e.g.*, to take corrective action."[11] Copies are also sent to vendors whose products are discussed in the reports. Apart from these routine distributions, the reports may be disclosed to third parties only upon INPO's specific consent.[12]

The NRC resisted CMEP's request for access to these documents, claiming that they are covered by exemption 4 as "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §

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[9](...continued)
tion firms currently involved in nuclear work." INPO Policy Note No. 11, "Classification and Distribution of INPO Publications" (Aug. 22, 1984), J.A. at 195.

[10] According to material filed by the NRC with this court shortly after oral argument in this case, the Nuclear Safety Analysis Center is an arm of the Electric Power Research Institute (EPRI), a membership organization composed of domestic utilities engaged in the commercial production of electricity. There is only partial overlap between INPO and EPRI membership, *i.e.*, some INPO members are not members of EPRI and *vice versa*. The Nuclear Electric Insurance Limited (NEIL) provides its member utilities with replacement power insurance and property insurance; all NEIL members are also members of INPO.

[11] Brief for the Appellee at 9 n. 7.

[12] INPO classifies these reports in its "Limited Distribution" category, and displays the following statement prominently on the title page:

> Reproduction of not more than ten copies by each recipient for its internal use or use by its contractors in the normal course of business is permitted. This report should not be otherwise transferred or delivered to any third person, and its contents should not be made public, without the prior agreement of INPO.

Policy Note No. 11, *supra* note 9, J.A. at 198.

552(b)(4). The district court agreed, and granted the NRC's motion for summary judgment.[13] We vacate the judgment so ordered, concluding that the NRC, on the record thus far made, has not established that the documents sought are sheltered by the exemption claimed.

II.

To sustain its burden of demonstrating that these documents are within FOIA exemption 4,[14] the NRC must show that the information contained therein is "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F. 2d 392, 403 (D.C. Cir. 1980), quoting *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971). CMEP concedes that these reports were "obtained from a person,"[15] and the NRC admits that the information contained in the reports is neither "financial" nor "privileged"; therefore, we must decide, first, whether the information in the INPO reports is "commercial," and, if so, whether it is "confidential." We hold that the information is "commercial," but that the record, in its current state, does not permit a dispositive answer to the ultimate question: Is the information "confidential"?

A. *The INPO Reports Are "Commercial."*

We agree with the district court's conclusion that, contrary to CMEP's contention, the reports contain "commercial" information: "INPO's constituent utility compa-

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[13] Memorandum and Order, *supra* note 1, at 7, J.A. at 290.

[14] In a civil suit on a FOIA claim, the "burden is on the agency to sustain" its action. 5 U.S.C. § 552(a)(4)(B).

[15] For FOIA purposes, a "person" may be a "partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

nies are assuredly commercial enterprises engaged in the production and sale of electrical power for profit [and] [t]he revelation of the details of the operations of their nuclear power plants . . . could materially affect their profitability in multiple ways."[16] INPO itself is a not-for-profit enterprise, but INPO's non-profit status is not determinative of the character of the information it reports; information may qualify as "commercial" even if the provider's (*i.e.*, INPO's) interest in gathering, processing, and reporting the information is non-commercial. *See Board of Trade*, 627 F.2d at 405-06 (the "plain language" of exemption 4 "does not in any way suggest that this information must relate to the affairs of the provider"; the exemption is "sufficiently broad to encompass financial and commercial information concerning a third party").

In *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983), we held that manufacturers of intraocular lenses had a "commercial interest" in health and safety data submitted to the FDA because the data would be "instrumental in gaining marketing approval for their products." *Id.* at 1290. Comparably, the commercial fortunes of INPO's member utilities, and the vendors whose products are appraised in the INPO reports, could be materially affected by the disclosure of health and safety problems experienced during the operation of nuclear power facilities.

B. *Are the INPO Reports "Confidential"?*

Turning to the "confidential" nature of this information, the precedent that guides us establishes two prime requirements. First, the agency must demonstrate that the information it seeks to shield "would customarily not be released to the public by the person from whom it was

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[16] Memorandum and Order, *supra* note 1, at 4, J.A. at 287.

obtained." *Board of Trade*, 627 F.2d at 404, quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). We conclude that the NRC has made this demonstration.[17]

Second, the agency must demonstrate that "disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." *9 to 5 Organization for Women Office Workers v. Board of Governors*, 721 F.2d 1, 9 (1st Cir. 1983). In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974), we focused upon two of those interests: the "need of government policy-makers to have access to commercial and financial data," *id.* at 767; and the need to "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* at 768. We also noted that Congress had advanced these justifications for "the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must." *Id.* at 769. Ultimately, we fashioned the following test:

> [C]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted). We conclude that the NRC has not established the impairment of its future information-gathering ability prerequisite to affirming the entry of summary judgment in its favor.[18]

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[17] *See infra* Section II.B.1.

[18] *See infra* Section II.B.2.

We reserved in *National Parks* the question whether the government could sustain its exemption 4 burden by proving "impairment" of interests other than the two cited in the test we delineated. *See id.* at 770 n. 17 ("We express no opinion as to whether other governmental interests are embodied in this exemption."); *see also Washington Post Co. v. HHS*, 690 F.2d 252, 268 n. 51 (D.C. Cir. 1982) (similarly reserving judgment). We now hold, *see infra* Section II.B.3, that the NRC may invoke exemption 4 on the basis of interests other than the two identified in our *National Parks* test; here again, however, because we are uncertain of the precise position the NRC seeks to advance, we remand the matter for further proceedings.

1. Are the INPO Reports "Customarily . . . Released to the Public"?

We agree with the district court that the NRC has met its threshold burden on this issue. As noted earlier, *see supra* pp. 3-4, the INPO reports receive fairly wide dissemination to individuals and organizations engaged in the nuclear power production process; nonetheless, receipt is premised upon compliance with INPO's stated policy of nondisclosure to third parties, and nothing in this record suggests that INPO's "limited distribution" policy is less than conscientiously observed. Because the class of recipients, while large, is well defined, and because an explicit nondisclosure policy is apparently adhered to in practice, we hold that the INPO reports meet this first confidentiality threshold. *Cf. Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985) (audit reports available to water supply corporation's members held not confidential; "what five thousand people may obtain *without even a pledge of nondisclosure* is not confidential") (emphasis added).

2. Would Disclosure Impair the NRC's Ability to Obtain Necessary Information in the Future?

The NRC's "impairment" claim under this prong of the *National Parks* test,[19] *see supra* p. 7, is not a model of clear statement. We endeavor next to examine its components.

First, the NRC points to "unequivocal statements" in the record "that INPO would not [voluntarily continue to] supply these reports to the NRC if the agency made them available to the public.[20] CMEP, however, urges us to treat these "self-serving" representations on INPO's part with "considerable skepticism" inasmuch as "it runs directly counter to the interests of INPO and its members for INPO to jeopardize its relationship with the NRC by refusing to voluntarily release its safety reports."[21]

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[19] No claim is pressed here that disclosure would "cause substantial harm" to INPO's "competitive position."

[20] Brief for the Appellee at 21. The principal statement cited appears in a letter to the NRC from Zack T. Pate, INPO's Chief Executive Officer, in which he stated: "We have now reached the conclusion that, in the event these documents are released, INPO will not furnish any confidential documents to the NRC in the future." Exhibit F, Affidavit of Angelina Howard, INPO Director of Communications (Aug. 30, 1985).

[21] Brief for Plaintiff-Appellant at 14-15. In fuller statement, CMEP argued:

> INPO is not a neutral third party that can afford to alienate the NRC by refusing to yield documents the Commission needs to perform its statutory duties . . . . Rather, the reports are designed to convince the Commission that the nuclear industry is adequately addressing safety problems and that the Commission need not further tighten its regulatory grip, as suggested by the [Presidential] Commission [that investigated the Three Mile Island accident]. . . . In short, it runs directly counter to the interests of INPO and its

(continued...)

Even if we were to assume that INPO would discontinue voluntary transmission to the NRC, however, it is not clear whether, or the extent to which, the Commission's future ability to obtain necessary information would be impaired. A "minor impairment," we have elsewhere observed, "cannot overcome the disclosure mandate of FOIA[;] the impairment [must be] significant enough to justify withholding the information." *Washington Post*, 690 F.2d at 269 (remanding case for the district court to make findings on "the *extent*" to which the government's ability to obtain information would be "impaired" by disclosure); *accord Pacific Architects & Engineers, Inc. v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974) (same).

We note, in this regard, that INPO has *not* suggested that it would discontinue either production of the reports here at issue, dissemination of those reports to its members, or any other aspect of its SEE-IN program — let alone that INPO itself would disband — were we to reject definitively the NRC's FOIA exemption plea.[22] Therefore, to show the requisite impairment of its information-gathering ability, the agency must persuade the court

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[21](...continued)

> members for INPO to jeopardize its relationship with the NRC by refusing to voluntarily release its safety reports.

Id.

[22] The district court observed:

> INPO is not regulated by the NRC, and is under no legal obligation to report anything to the NRC, or even to prepare reports at all. It is fully autonomous, and could abandon its peer review process altogether, or disband as easily as it came into existence.

Memorandum and Order, *supra* note 1, at 6, J.A. at 289. While INPO could indeed close up shop without the NRC's leave, nothing in this record so much as hints that INPO or its members would consider that final solution to this FOIA case within the realm of INPO's practical options.

either (1) that cessation of INPO's voluntary submission of these reports would in fact deprive the agency of the information contained therein, or (2) that alternative available means for obtaining the INPO reports would entail a significant risk that the value of the submitted reports would decrease.

The district court made no findings on these questions, observing only that "it is preferable to have the INPO reports furnished to the NRC voluntarily, rather than delivered up under compulsion in circumstances less conducive to candor, accuracy, and timeliness."[23] We agree, but were that proposition sufficient to overcome FOIA's disclosure mandate, our circuit's requirement that the agency provide a "*detailed justification* [of] the extent to which disclosure . . . will impair the government's ability to obtain necessary information [, supported by] *specific factual or evidentiary material*," *Pacific Architects*, 505 F.2d at 385 (emphasis added), would have little, or no, force. Why demand detail if the voluntary character of the submission suffices to shield the reports?

We note, first, the NRC's concession that it has ample statutory authority, under 42 U.S.C. § 2201(c),[24] to

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[23] Memorandum and Order, *supra* note 1, at 6-7, J.A. at 289-90.

[24] The relevant statutory provision reads:

> In the performance of its functions the Commission is authorized to—
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> . . .
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> (c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths to appear and testify, or to appear and produce documents, or both, at any designated place.

compel the production of the INPO reports, either by "institut[ing] a program of periodic issuances of subpoenas"[25] to INPO or its utility-members, or by requiring those utilities to submit the INPO reports as a condition of obtaining a license from the NRC.[26] However, even if the NRC could compel production of all INPO reports, the question remains whether compelled production would entail *qualitative* impairment of the information contained therein. Our precedents recognize that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own

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[25] Defendant's Answers to Plaintiff's Interrogatories ¶ 8(F), J.A. at 43.

[26] Brief for the Appellee at 27. Additionally, the agency's existing regulations, *see* 10 C.F.R § 50.73 and *infra* pp. 17-18, may encompass a requirement that its licensees submit these reports as a condition of license.

We emphasize that our focus here is exclusively on the likely impact of disclosure on the NRC's interest in continued receipt of the information it now obtains from INPO; on that question, the agency's ability to compel production of the INPO reports, should voluntary submission terminate, is a relevant consideration. *See Washington Post Co. v. HHS*, 690 F.2d 252, 268 (D.C. Cir. 1982) (mandatory nature of disclosure is "a factor [to be considered] in deciding whether the government's access to information is likely to be impaired"; "[i]f the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment"); *cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir.1974) (because holders of National Parks concessions are required to provide financial information to the government, "there is presumably no danger that public disclosure will impair the ability of the government to obtain this information").

We recognize that the agency may have substantial, indeed compelling, reasons why it would choose not to exercise the coercive powers at its disposal. Under the *National Parks* test as we develop it today, *see*, *infra* Section II.B.3, those concerns are more properly addressed as part of the agency's claim that other interests — *e.g.*, program effectiveness or efficiency — will be harmed by disclosure.

interests." *Association for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977), quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974); *see also Washington Post*, 690 F.2d at 268 ("If the government can enforce the disclosure obligation, *and if the resultant disclosure is likely to be accurate*, that may be sufficient to prevent any impairment.") (emphasis added). The NRC has asserted that disclosure would result in a "substantial risk that the reports . . . would become less valuable."[27] But at this juncture, that assertion lacks clear focus and solid factual support.

The Commission's presentation leaves us uncertain as to the contours of this facet of the NRC's impairment claim. To explain our difficulty in fathoming the Commission's position, we describe in more detail the nature of the information contained in the INPO reports. INPO obtains most of the *factual* material on which its reports are based from information filed with the NRC by INPO's member utilities — information that the NRC routinely makes available to the public.[28] INPO also obtains relevant data, however, from other, nonpublic sources, such as interviews with plant personnel during either routine site visits or detailed field investigations of particular safety-related events.[29] In addition, the O & MRs, *see*

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[27] Brief for the Appellee at 22.

[28] Under 10 C.F.R. § 50.73, all nuclear power plant licensees must submit "Licensee Event Reports" (LERs) within 30 days after discovery of a safety-related "reportable event." Approximately 2500 LERs are submitted annually to the NRC, and all are made available to the public. Declaration of Frederick Hebdon, Chief of the NRC's Program Technology Branch, ¶ 3-4 (n.d.), J.A. at 141-42.

[29] The parties call our attention to conflicting record evidence on the extent to which the INPO reports contain factual data not otherwise in the NRC's possession. For example, the NRC admits that

(continued...)

supra, p. 3, may discuss "nonsafety related incidents that are not required to be reported [to] the NRC but that one of INPO's members has brought to [INPO's] attention, or . . . event[s] or occurrence[s] which [have] been reported to INPO by one of its vendor participants."[30]

Quite apart from the factual material collected by INPO and included in its SEE-IN reports, INPO performs its own analyses of the reported events, *e.g.*, trend analysis "to determine if patterns of recurrence among events indicate underlying problems requiring action," and sequential risk analysis "to examine the actual sequence and all possible sequences associated with an event in

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[29](...continued)
"INPO['s] safety reports have not provided the NRC with any new base data that was not otherwise available to it." Plaintiff's Statement of Material Facts ¶ 8, J.A. at 266; Defendant's Response ¶ 8, J.A. at 263 ("Defendant admits the facts in this paragraph."). *See also* Defendant's Answers to Plaintiff's Interrogatories ¶¶ 4(J)(3), 9(J)(3), and 14(J)(3), J.A. at 32, 54 and 71 (conceding in identical language, that the SERs, SOERs and O & MRs "have not provided any *new* information which was not otherwise available but have provided *supplementary* information which is useful to the NRC") (emphasis added). If the NRC is attaching particular significance to a distinction between "new" and "supplementary" information, we fail to grasp what the distinction is or why it is significant.

At the same time, the Hebdon Declaration, *see supra* note 28, appears to contradict directly the NRC's admission of no "new base data" in the reports: "[S]ometimes the base data in an SOER is different from the information that the NRC has received through its LER system." Hebdon Declaration, *supra* note 28, ¶ 13, J.A. at 149; *see also id.* at ¶ 7 J.A. at 144 ("SERs often consist of additional data (to that contained in the LER on which the SER is based)"); *id.* at ¶ 16, J.A. at 151 ("O & MRs can be based on data which is not required to be reported to the NRC").

[30] Hebdon Declaration, *supra* note 28, ¶ 7, J.A. at 143.

order to reveal problems with design and operational practices that might not be detected otherwise." [31]

This dual aspect — factual and analytical — of the information the NRC receives from INPO suggests two ways in which the NRC's ability to obtain that information may be impaired by public disclosure. First, INPO's analyses may be conducted less vigorously, and in its brief to this court, the NRC so contends. The Commission asserts that "[i]f *INPO* knows that the reports will be publicly disclosed, its reports are *less likely to be entirely candid* and, therefore, helpful to the NRC."[32] We find the record barren, however, of any support for this assertion; the record evidence to which the NRC's brief refers does not, in fact, even suggest that INPO would perform its *analytical* tasks with less candor or thoroughness post-disclosure than it does at present. Rather, the evidence speaks to a related, but distinct, claim, that the *factual* basis of the INPO reports will be impaired.[33]

The claim that disclosure will impair the quality of the analysis is not implausible, particularly in light of the

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[31] Brief for the Appellee at 7 n. 4; *see also id.* at 18 ("more important, these records are more than dry recitations of objective 'facts'; they are chock full of independent analysis of INPO's staff").

[32] *Id.* at 22 (emphasis added).

[33] Declaration of Joseph Felton, Director of NRC's Division of Rules and Records ¶ 20, J.A. at 100 ("To the extent [that] INPO's [reports] are subject to public disclosure, it is reasonable to believe that *INPO members* would be less likely to frankly and candidly divulge any information beyond that required by current NRC rules[.]") (emphasis added); *see also* Brief for the Appellee at 9 ("If these [reports] were publicly disclosed, INPO's members would be less likely to divulge any information not required by current NRC regulations due to fears of adverse economic and publicity-related consequences[.]").

resemblance between INPO's analytical process and the agency "deliberative process" protected by exemption (b)(5), 5 U.S.C. § 552(b)(5). However, the agency's burden under FOIA requires more than plausibility.[34] The NRC has failed to put forward the "detailed justification" our precedents require. *Pacific Architects*, 505 F.2d at 385; *see also Orion Research Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980) (the "mere conclusory say-so of an agency that its ability to acquire information would be impaired will [not] suffice"; that conclusion must be "plausibly supported in some detail").

We mention in particular two shortcomings in the NRC's evidence. First, as noted above, *see supra* note 29, we find confusing and possibly contradictory evidence in the record concerning the presence *vel non* of any "base data" in the INPO reports that are otherwise not already in the agency's possession. Obviously, the *NRC*'s ability to gather information it already independently receives cannot be "impaired" should the utilities become less than forthcoming in providing that information to *INPO*.

Second, even were we to credit the NRC's assertions that *any* lack of candor on the utilities' part would deprive it of *some* necessary information, we remind the agency of its burden to persuade the reviewing court that "the impairment is significant enough to justify withholding the information." *Washington Post*, 690 F.2d at 269. This requires the agency to specify, with greater precision than the NRC has here, the kinds of information it fears it will be deprived of in the future and the uses to which that information is currently put. Only then can a court intelligently gauge the nature and significance of the impairment that may accompany disclosure.

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[34] This is particularly true where, as here, the agency is attempting to establish its impairment claim on a motion for summary judgment.

On remand, then, the NRC should be given the opportunity to document its necessarily uncertain prediction that disclosure would impair either the factual base, or analytical quality, of the INPO reports. To pass muster, the agency must spell out comprehensibly both the nature of the information of which it fears it will be deprived, and the nexus between the disclosure sought by CMEP and the anticipated impairment.

3. Will Disclosure Impair Other Interests Covered by Exemption 4?

As noted earlier, *see* p. 7 this circuit has not heretofore decided whether the test set forth in *National Parks* constitutes the exclusive means by which the government can sustain its exemption 4 burden, *i.e.*, whether information can be justifiably withheld where disclosure would harm the agency in ways unrelated to its ability to gather information in the future. The First Circuit recently confronted this precise question and, after carefully examining both the relevant legislative history and case law, concluded that "[i]n view of the legitimate governmental interest of efficient operation, it would do violence to the statutory purpose of exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities." *9 to 5 Organization*, 721 F.2d at 11; *see also id.* at 12 (Breyer, J., dissenting) (agreeing with the court's expansion of the *National Parks* test while disagreeing with the application of the expanded standard to the case before the court).

We find the First Circuit's reasoning persuasive; however, we again conclude that the NRC has not sustained its burden of specifying the relevant "governmental interest which the Congress sought to protect by enacting exemption 4 [or demonstrating] how that interest will be harmed by public disclosure of the specific information which has been requested." *Id.* at 10.

The NRC's "impairment of agency efficiency" contention rests, it appears,[35] on its assertion that "even if [it] could somehow get the same information it now receives from INPO in these reports" — *e.g.*, by periodic issuances of subpoenas, *see supra* p. 11 and notes 24-26 — "the sacrifice in the efficiency of its operations and the burdens it would necessarily bear in securing the information through other means would be too heavy."[36] We note, however, that there is a very real possibility that the NRC's existing regulations encompass a requirement that its licensees submit these reports. The relevant prescription, 10 C.F.R. § 50.73(c), states:

> The Commission may require the licensee to submit specific additional information beyond that required by [10 C.F.R. § 50.73(b)] if the Commission finds that supplemental material is necessary for complete understanding of an unusually complex or significant event.

The NRC's argument that it could not "demand that the licensees furnish it with copies of the reports as a condition to their status as licensees," [37] is backed up only by an NRC staff member's statement that plausibly could be interpreted to mean either that the Commission simply has not made such a demand in the past, or that it lacks the

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[35] We acknowledge that some of the confusion in the NRC's brief on this question can be traced to the uncertain state of our precedents in this area.

[36] *See, e.g.*, Brief for the Appellee at 29-30 ("Plaintiff's suggestion that the NRC could get by subpoena the information it now gets through INPO's voluntary cooperation . . . ignores. . . the practical problems that dot the subpoena route. . . . [T]he substantial burdens that the subpoena alternative would impose on the agency and the unavoidable delays in getting the information through the subpoena process show that coercion is not a reasonable alternative means for getting such information[.]").

[37] *Id.* at 26.

authority to do so under the regulation.[38] A linchpin of the NRC's argument in this case, we reiterate, is that the INPO reports are "necessary for complete understanding of . . . unusually complex or significant event[s]."[39]

We therefore remand the question whether the Commission has authoritatively construed the regulation to be inapplicable to third-party reports. If the Commission or the lower court interprets the regulation as authorizing the NRC to obtain third-party reports, the court should then obtain the Commission's views on the application of the regulation to the facts of the case; that is, in view of the regulation's authorization to require additional material if necessary for the Commission's understanding of "an unusually complex or significant event," does the regulation cover SERs, SOERs, and O & MRs? If so, the district court should afford the agency the opportunity to

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[38] The NRC points only to the following statement by Frederick Hebdon, Chief of the NRC's Program Technology Branch, in support of the statement quoted *supra* at note 37:

> Section 50.73(c) enables the staff to collect additional, more detailed factual information about an event from a licensee when it is felt such information is needed. To analyze a very complex event, the staff may need more or different information than that which is provided for in 50.73(b). Section 50.73(c) has never been construed by the staff to cover third party reports or information. To my knowledge, this section has never been used by the staff to request, from a licensee in writing, additional information about an event. Such requests are usually handled informally by a phone call.

Supplemental Declaration of Frederick Hebdon (Oct. 25, 1985) ¶ 3, J.A. at 237-38.

[39] *See, e.g.*, Brief for the Appellee at 10 ("The record before the district court also showed that the NRC needs the information that INPO's reports now contain."). Throughout this litigation, *see supra* pp. 8-16, with a view to *National Parks & Conservation Ass'n v. Morton*, 498 F.2d at 770, the NRC has argued insistently that disclosure will "impair [its] ability to obtain *necessary information* in the future."

show, if it so chooses, that exercising its full authority under this regulation would damage some identifiable agency interest relating to program effectiveness or efficiency. If, on the other hand, the regulation does not authorize the Commission to obtain third-party reports, the district court should then consider the NRC's contention that resort to other means of obtaining this information would significantly impair "efficient operation[s]" or "effective execution of [NRC's] statutory responsibilities," *9 to 5 Organization*, 721 F.2d at 11.

CONCLUSION

For the reasons stated, we vacate the district court's order directing summary judgment for the NRC. The Commission has not yet substantiated its claims that the disclosure it resists would impair either its ability to obtain necessary information in the future, or the efficient and effective performance of the regulatory responsibilities Congress has assigned to it. We therefore return this case to the district court for further proceedings consistent with this opinion.

It is so ordered.

BUCKLEY, *Circuit Judge*, concurring in part and dissenting in part:

There is an inherent hazard in the process by which our courts flesh out the meaning of a statue. Over time, judges adding another link to the precedential chain may become so intent on exploring the implications of the last preceding case that they lose sight of the statute itself and end up frustrating its purpose. Such is the case with the decision we issue today.

After reviewing the exemption's legislative history, we observed, in *National Parks*, that the exemption covered two categories of private commercial information in the government's possession: that which is voluntarily provided and that which is exacted by statute or regulation. 498 F.2d at 769. We concluded that Congress had

> a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

Id. The INPO reports clearly fall within the first category. Yet rather than apply exemption 4 in a manner consistent with the congressional purpose of encouraging the private sector to cooperate with government, we place it on notice that anyone who voluntarily provides the government with confidential information does so at significant risk.

The majority and I agree that the Reports are shielded from disclosure *if*, as the agency contends, the information they contain is confidential within the meaning of exemption 4. We part company on how that information is to be categorized. In *National Parks* this court established a test for determining this key element of section 552(b)(4):

> [A] commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following

> effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770. Given the court's finding as to the exemption's purposes, I read the first element of the test (in the case of information a person is not required to provide) to refer to the effect of disclosure on an agency's future ability to obtain necessary information *on a voluntary basis*. The court, however, now rewrites the test to provide that commercial information will be deemed "confidential" only if its disclosure would impair the government's ability to *compel* the production of like information in the future from whatever source, and it claims to do so on the authority of *National Parks* and *Washington Post*. Maj. Op. at 11-12 n. 26.

Neither case supports so radical a change. *National Parks* and *Washington Post* deal with information third parties have been required to provide government agencies. In each case, the court must decide whether public disclosure will impair the accuracy of future information received from those same parties even though its production is mandatory. Nowhere is it suggested that in applying the exemption, an agency's ability to obtain information is to be measured by what it might be able to compel from other sources were it to unleash the statutory powers at its disposal.

Taken alone, the phrase "ability to obtain" is capable of a broad range of interpretations. Exemption 4, however, must be applied within the scope of its statutory context and purpose. FOIA is a *disclosure* statute. It deals with information currently in an agency's possession, and with the nature and sources of that information. It does not require that the agency determine how it might coerce the production of information it presently receives to its satisfaction through cooperative means. In short,

there is no basis in the statute for the ruling we announce today; a ruling that is unwarranted by circuit precedent, at odds with precedent elsewhere,* and subversive of one of Congress' prime objectives, namely, to "encourag[e] cooperation by those who are not obliged to provide information to the government." *National Parks*, 498 F.2d at 769. In fact, it is hard to conceive of a rule more likely to discourage such cooperation, as citizens are now forewarned that confidential information they voluntarily provide may be disclosed whenever a court concludes that the agency has the power to compel the production of similar information from any other source.

My concern over today's decision goes beyond its emasculation of exemption 4. I fear we may be opening a vast new field for future litigation. What are the limits of a presumption that any information voluntarily provided under a promise of confidentiality is subject to FOIA disclosure if the production of similar information could be compelled? Would not such a standard force courts to adjudicate a host of hypothetical claims: Does the statutory power exist to compel disclosure? If the power exists, does it apply to the particular matter being sought; and, if it does apply, would program efficiency be impaired? — all this simply to determine whether the material is exempt from FOIA absent an invocation of these hypothetical powers. Maj. op. at 19. Given the sweeping reach of FOIA, are we not sanctioning a wholly novel form of suit?

As I concur in the court's adoption of the holding in *9 to 5 Organization*, Maj. op. at 17, I agree that on remand, the NRC may base its claim of exemption on the alternative ground of impairment of the efficient and effective performance of its regulatory responsibilities.

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* *Cf. General Electric Co. v. NRC*, 750 F.2d 1394, 1398 (7th Cir. 1984) (information exempt "if disclosure would . . . make it difficult for the agency to induce people to submit similar information to it in the future" (citing *National Parks*)).

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DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1943
(TPJ)

CRITICAL MASS ENERGY PROJECT,
Plaintiff,

v.

NUCLEAR REGULATORY COMMISSION,
Defendant,

INSTITUTE OF NUCLEAR POWER OPERATIONS,
Defendant-Intervenor.

MEMORANDUM AND ORDER

This FOIA case is once more before the Court on cross-motions for summary judgment following remand from the court of appeals.[1] The plaintiff, a consumer organization, is requesting copies of certain reports presently furnished voluntarily to defendant Nuclear Regulatory Commission ("NRC") by a former stranger to this litigation, the Institute of Nuclear Power Operations ("INPO"). INPO has, since remand, intervened as a co-defendant. Although this case bids fair to rival the saga of *Washington Post Co. v. U.S. Department of Health*

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[1] *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 644 F. Supp. 344 (D.D.C. 1986), *vacated and remanded*, 830 F.2d 278 (D.C. Cir. 1987).

and Human Services,[2] the Court will once again grant defendants' motion and dismiss the complaint.

I.

INPO is a private non-profit consortium of electric utility companies operating nuclear power plants in the United States. It produces, and circulates to its membership, the reports at issue which present the results of its own inquiries into significant safety-related events or experiences occurring at its members' nuclear power plants. INPO also furnishes copies of its reports to the NRC, upon the express condition, however, that NRC not make them public without INPO's consent, and INPO does not consent to plaintiff's request here. NRC has, thus, invoked FOIA's Exemption 4, 5 U.S.C. §§ 552(b)(4), to justify its refusal to comply with that request.[3]

The court of appeals found the INPO reports to possess all the characteristics of documents entitled to Exemption 4 status save one, and remanded for this Court's factual determination as to whether their disclosure pursuant to FOIA request would compromise a governmental interest sought to be served by the Exemption 4, either by impairing NRC's

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[2]Civ. No. 80-1681, Mem. Op. (D.D.C. Dec. 4, 1980), *reversed and remanded,* 690 F.2d 252 (D.C. Cir. 1982), *on remand,* 603 F. Supp. 235 (D.D.C. 1985), *reversed and remanded,* 795 F.2d 205 (D.C. Cir. 1986), *on remand,* Mem. Op. (D.D.C. Nov. 20, 1987), *reversed and remanded,* 865 F.2d 320 (D.C. Cir. 1989).

[3]Ironically, had the same reports been prepared directly by NRC's own investigators, using INPO's sources and techniques, they would likely be immune from disclosure under FOIA's Exemption 5. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Badhwar v. U.S. Dep't of the Air Force,* 829 F.2d 182 (D.C. Cir. 1987).

ability to obtain the reports in the future (specifically, information of the same quality they presently impart), or by diminishing NRC's own regulatory efficiency or effectiveness. *Critical Mass Energy Project*, 830 F.2d at 287.

II.

The determination mandated by the court of appeals requires "balanc[ing] the individual litigant's [i.e., the requestor's] need for information against the government's need to obtain the information in the future," *Washington Post Co.*, 690 F.2d at 258, and "the *extent* to which the government's ability to obtain [the] information would be impaired . . . against the public interest in disclosure." *Id.* at 269 (emphasis in original).[4] It also necessitates a prediction of sorts as to the nature of the INPO/NRC relationship without the protection of a FOIA exemption for INPO reports in NRC's possession.

Yet despite the bulk of the record before the Court, it is largely unrevealing as to how the defendants would react to a decision rendering the INPO reports disclosable under FOIA, other than INPO's unequivocal confirmation of the fact that one certain consequence will be the cessation of its practice of sharing them with NRC voluntarily.[5] Thenceforth NRC would have to resort to compulsion to get the reports, and, INPO declares, it would resist vigorously (and it represents that it is informed its individual members will resist as well).

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[4]The Court assumes that the "balancing" to be undertaken in Exemption 4 cases is an exception to, or at least a qualification of, the no-balancing rule generally observed in other FOIA contexts. *See Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971).

[5]INPO disclaims, for the present, any intention to stop preparing the reports altogether.

NRC and INPO are nevertheless fully in accord in one respect: the limited confidentiality the INPO reports presently enjoy, i.e., their general unavailability to the public at large, is indispensable to the quality of the information they contain. A host of declarants and affiants from both NRC and INPO (all of whom are highly qualified nuclear professionals possessing both years of relevant experience and the responsibility of currently relevant office) ardently attest to the importance of that circumstance as assuring maximum candor on the part of INPO's sources for the substance of its reports.[6]

The Court also perceives the position taken by NRC in this dispute as being more than perfunctory lip service to its commitment to INPO not to divulge the reports. From the NRC declarations alone it is apparent that NRC is convinced that it will experience a genuine loss of valuable regulatory intelligence, one way or another, if the INPO reporting process is made subject to general public scrutiny. NRC believes that it is now deriving from the INPO reports, and contemporaneously with the industry itself, the most insightful thinking of the best informed people within the industry on matters of safety, a commodity otherwise unavailable to it except through

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[6]NRC and INPO contend that the true value of the reports to the industry (and to NRC) lies not in the factual information they impart but, rather, in the insight they afford to as to "root causes" of the events and experiences which are frequently found to involve human error. The INPO personnel who compile the reports endeavor to get members' officials and plant personnel having knowledge of such events and experiences to engage in subjective self-critical or colleague-critical "rumination" about them. Were the reports to become public, candor would suffer, and, hence, diminish the value of the reporting process itself to INPO, to NRC, and ultimately to the public. *See, e.g.*, the affidavits of T.J. Sullivan (INPO) of August 26, 1988, and Edward L. Jordan (NRC) of October 28, 1988.

the good offices of an unofficial, industry-friendly organization such as INPO.

For its part plaintiff suggests no particularized need of its own for the reports. It is thus remitted to the general public interest in disclosure for disclosure's sake to support its request. To be sure, the public has an interest of significantly greater moment than idle curiosity in information bearing upon the safety of nuclear power plants. But so does NRC, and so do INPO and its members, and of a much more immediate and direct nature, in addition to their share of the general public interest.

Plaintiff also offers no affirmative evidence of its own to contradict defendants' declarants and affiants as to the importance of the information to the NRC, as to the extent to which NRC's ability to obtain it might be impaired were the INPO reports to be made public, or as to whether the NRC would be otherwise diminished in efficiency or effectiveness thereby. Plaintiff's case consists entirely of common sense inferences it asks the Court to draw from seeming concessions made by NRC to several of its discovery initiatives. The gist of those inferences is that the assertions of the NRC and INPO declarants and affiants are not to be credited, or at least not taken at face value.

For example, plaintiff argues, INPO members are already required to submit "licensee event reports" to NRC which are routinely made available to the public, although often containing revelations of human error, yet are conceded by defendants to be truthful as far as they go.[7] Moreover, plaintiff

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[7]The relationship between the "licensee event reports" and the INPO reports at issue, for defendants' pruposes, is illustrated by T.J. Sullivan's affidavit of February 20, 1990, and the declaration of Jack E. Rosenthal (NRC) of February 21, 1990, filed *in camera* post-hearing under seal at the Court's request. In certain respects that relationship resembles that of hospital records of patient care to peer review committee proceedings of particular cases. *See Bredice v. Doctors Hosptial, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

suggests, candor on the part of sources interviewed by INPO is more likely to be inhibited by fear of summary discipline or reprisal by an employer (or NRC) than by apprehension of eventual public exposure for confessions of job-related mistakes. Yet nothing about the current reporting process protects an INPO source's anonymity from any of the multiple intra-industry recipients of the reports, including the source's own employer.[8] Finally, plaintiff observes, NRC wields the whip hand: not only does it have subpoena and near-plenary regulatory powers should it choose to use them to get the INPO reports, NRC can also effectively hold the licenses of INPO members hostage until it gets what it wants, in terms of candor, from anyone in the industry.

III.

The Court finds the effect of the defendants' multiple declarations and affidavits, in the aggregate, to exceed the sum of their parts, and to carry defendants' burden of establishing entitlement to the exemption they claim for the INPO reports. Taken together they evince a symbiosis in the relationship between NRC and INPO which the Court foresees as being damaged were the INPO reports in NRC's possession to be subject to FOIA disclosure. Whether or not the reporting process would truly experience a loss of candor — an issue neither more declarations nor a parade of witnesses could definitively resolve in advance of the event — both NRC and INPO share the conviction that it would. The consequence would be that the information now freely shared by INPO with NRC would be withheld until it was demanded under some form of compulsion. The demand would have to be enforced, which would

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[8]Among other representations made by NRC or INPO for the first time at oral argument, which had nowhere found direct expression in their written submissions earlier, is one to the effect that INPO reports never beget discipline for sources from either an employer or NRC. It is now confirmed by the T.J. Sullivan affidavit of February 20, 1990.

likely precipitate both acrimony and some form of litigation with attendant expense and delay.

NRC and INPO would then no longer be collaborators in a quest for optimum industry safety, putting aside their other regulatory differences. If not outright antagonists, they would at best be wary allies, working independently of one another, duplicating one another's efforts, and mistrustful of one another's initiatives or overtures. That deterioration of the relationship, in this Court's opinion, represents a sufficient showing that NRC's efficiency and effectiveness would be impaired were it not permitted to honor its commitment to INPO to keep the INPO reports in confidence, and it is, therefore, this 2nd day of March, 1990,

ORDERED, that defendants' motion for summary judgment is again granted; and it is

FURTHER ORDERED, that the complaint is, once more, dismissed with prejudice.

/s/Thomas Penfield Jackson

Thomas Penfield Jackson
U.S. District Judge

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 11, 1991 Decided April 30, 1991

No. 90-5120

CRITICAL MASS ENERGY PROJECT,
Appellant

v.

NUCLEAR REGULATORY COMMISSION,

and

INSTITUTE FOR NUCLEAR POWER OPERATIONS,
Appellees

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 84-1943)

Paul R.Q. Wolfson, with whom *David C. Vladeck*, *Alan B. Morrison* and *Eric R. Glitzenstein* were on the brief, for the appellant.

Peter R. Maier, Attorney, United States Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

General, *Jay B. Stephens*, United States Attorney, *Leonard Schaitman*, Attorney, United States Department of Justice, *John Cordes*, Solicitor, Nuclear Regulatory Commission, and *Carolyn F. Evans*, Attorney, Nuclear Regulatory Commission, were on the brief, for appellee Nuclear Regulatory Commission.

James D. Miller with whom *Deborah J. Andrews* was on the brief, for appellee Institute of Nuclear Power Operations.

Before EDWARDS, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* RANDOLPH, in which *Circuit Judge* WILLIAMS joins.

EDWARDS, *Circuit Judge:* This appeal involves a claim under the Freedom of Information Act ("FOIA") regarding certain reports dealing with nuclear power plant safety. The disputed reports are prepared by the Institute for Nuclear Power Operations ("INPO"), a utility consortium; since 1982, INPO has shared these reports with the Nuclear Regulatory Commission ("NRC" or "Commission") pursuant to an agreement providing for the free exchange of nuclear information. The appellant, Critical Mass Energy Project ("Critical Mass"), seeks to secure copies of the reports from the Commission under FOIA.

In 1984, the NRC refused to release the INPO reports to Critical Mass, citing FOIA's exemption for confidential commercial information; Critical Mass then brought suit challenging the agency's action. The District Court issued a summary judgment in favor of the NRC; however, that judgment was vacated on appeal and the case was remanded to the District Court for further proceedings. *See Critical Mass Energy Project v. NRC*, 830 F.2d 278 (D.C. Cir. 1987) ("*Critical Mass I*"). On remand, the District Court once again denied the appellant's FOIA request, holding that the INPO reports were protected from disclosure under FOIA Exemption 4. Summary

judgment was awarded to the Commission, and Critical Mass has appealed from that judgment.

On the record before us, we can find no basis to conclude that disclosure of the relevant reports would be likely to result in any significant impairment of either the effectiveness or efficiency of the NRC by virtue of anticipated antagonism in the relationship between INPO and the Commission. We therefore reverse the judgment of the District Court on this point. In addition, because we find that genuine issues of material fact remain concerning the likely effects of disclosure on the Commission's information-gathering ability, we remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. *Facts*

In the wake of the Three Mile Island accident, the nuclear electric utility industry formed INPO, a voluntary membership organization designed to promote safety and reliability in nuclear power plant operations through peer review. INPO, which is comprised of and funded by utility companies that operate or construct nuclear plants in the United States, employs approximately 400 engineers and other staff. One of INPO's principal programs is the Significant Event Evaluation and Information Network ("SEE-IN"), a system for collecting, analyzing and sharing information concerning construction and operations experiences within the nuclear power industry.

As part of SEE-IN, INPO produces three types of reports on nuclear power plant operations: Significant Event Reports ("SERs"); Significant Operating Event Reports ("SOERs"); and Operation & Maintenance Reminders ("O&MRs"). As their titles suggest, SERs and SOERs involve operating events at nuclear facilities deemed "significant" by INPO engineers. SERs include descriptions of the events, discussions of their possible causes and effects and INPO's analyses of the prob-

lems identified; SOERs are more detailed follow-up analyses, containing more wide-ranging, generic recommendations to utilities regarding plant construction, design and operation. O&MRs describe less significant operating and maintenance problems encountered in specific plants and discuss the means used to correct them. In preparing the SERs, SOERs and O&MRs, INPO analysts solicit comments and evaluations from working-level employees who have some familiarity with the events and problems raised in the reports.

INPO currently distributes copies of its SEE-IN reports to all INPO members and "participants,"[1] to the Nuclear Safety Analysis Center (a membership organization of utilities engaged in the commercial production of electricity) and to Nuclear Electric Insurance Limited (an insurer of INPO utilities). In addition, INPO provides copies of particular reports to vendors whose products are mentioned in those reports, and to outside consultants and contractors where necessary to take corrective action suggested by the reports. Pursuant to a 1982 Memorandum of Agreement providing for the free exchange of nuclear safety information between INPO and the Government, INPO also transmits copies of all SEE-IN reports to the Commission. INPO sends its reports to each of the foregoing recipients with an understanding that the reports will not be disclosed to additional third parties without INPO's consent.[2]

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[1]INPO's participants are domestic companies that serve as suppliers to nuclear plants and international utility organizations that operate or construct nuclear facilities in foreign countries.

[2]SEE-IN reports contain the following statement:

> Reproduction of not more than ten copies by each recipient for its internal use or use by its contractors in the normal course of business is permitted. This report should not be otherwise transferred or delivered to any third person, and its contents should not be made public, without the prior agreement of INPO.

Exhibits A, B & C to Supplemental Affidavit of Terence J. Sullivan, *reprinted in* Joint Appendix ("J.A.") 553, 574, 589.

B. *The Decision in* Critical Mass I

In 1984, Critical Mass filed a FOIA request seeking access to INPO reports in the Commission's possession. The NRC denied the request on the grounds that the reports were protected from disclosure under FOIA Exemption 4, which shields "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1988). Critical Mass thereupon brought suit in the District Court challenging the Commission's decisions. Finding that the records properly came within the ambit of Exemption 4, the District Court granted the Commission's motion for summary judgment.

Following argument before another panel of this court, the District Court's judgment was vacated on appeal. The decision in *Critical Mass I* first notes that, under FOIA, the agency carries the burden of justifying the decision not to disclose the undisputed reports. *Critical Mass I*, 830 F.2d at 281 & n.14. The decision then observes that our precedent has established "two prime requirements" for confidentiality. *Id.* at 281.[3] First, the agency must show "that the information it seeks to shield would customarily not be released to the public by the person from whom it was obtained." *Id.* (internal quotation omitted). The decision finds this requirement to be satisfied by INPO's limited distribution of its reports to a well-defined (albeit large) class of recipients and its articulated policy forbidding unauthorized disclosure of the reports to third parties.

Second, the *Critical Mass I* decision declares that "the agency must demonstrate that disclosure [would] . . . harm a specific interest that Congress sought to protect by enacting the exemption." *Id.* (internal quotation omitted). On this point, the court notes that, under the holding of *National Parks &*

[3]The court found that, apart from the issue of their confidentiality, the INPO reports came within the scope of Exemption 4 because they were "commercial" and had been "obtained from a person." *Id.*

Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), we have recognized two such protected interests: (1) the Government's need to have access to commercial and financial data and (2) the need to safeguard persons submitting such data to the Government from the competitive harms that might result from general publication. Focusing on these interests, *National Parks* established the following test for the application of Exemption 4:

> [C]ommercial or financial matter is "confidential" . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information is obtained.

National Parks, 498 F.2d at 770 (footnote omitted). In the decision under review in *Critical Mass I*, the District Court had relied on the first prong of this test, finding that disclosure of the INPO reports would be likely to impair the Commission's future ability to acquire the information they contained.[4]

This court rejected the judgment of the District Court in *Critical Mass I* for lack of evidentiary support in the record. INPO had made no contention that it would discontinue either preparing the reports or disseminating them to its members if disclosure were required under FOIA; INPO had merely represented that it would no longer voluntarily submit the reports to the Commission. Accordingly, the decision in *Critical Mass I* holds that, in order to show a significant impairment to its information-gathering ability, the Commission had to demonstrate "either (1) that cessation of INPO's voluntary submission of these reports would in fact deprive the agency of the information contained therein, or (2) that alternative means for obtaining the . . . reports would create a significant risk that . . . [their] value . . . would decrease." 830 F.2d

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[4]There had been no contention that disclosure of the reports would have had adverse competitive effects upon INPO.

at 283. There was no dispute on the first point because the Commission had conceded that it possessed "ample statutory authority" to obtain the INPO reports by compulsory means. *Id.* On the second point, however, the parties disagreed over the possible effect of public disclosure on the quality of the information and analyses in the reports. Because the District Court had made no findings on this second point, the case was remanded to allow the Commission to document its "necessarily uncertain prediction," *id.* at 286, that disclosure of the INPO reports would result in "impairment . . . significant enough to justify withholding the information." *Id.* (*quoting Washington Post Co. v. HHS*, 690 F.2d 252, 269 (D.C. Cir. 1982)).

In remanding, the decision in *Critical Mass I* amplifies somewhat on the *National Parks* test, indicating that, with respect to the question of confidentiality under Exemption 4, nondisclosure also may be appropriate if the agency can show that public disclosure will significantly harm the agency's interests in its efficient operations or in the effective execution of its statutory responsibilities. *Critical Mass I*, 830 F.2d at 286-87. Thus, the District Court was instructed to afford the Commission the opportunity to demonstrate that disclosure of the INPO reports would damage "some identifiable agency interest relating to program effectiveness or efficiency." *Id.* at 287.

Following the decision in *Critical Mass I*, INPO intervened as a co-defendant. After additional proceedings before the trial court, summary judgment was once again awarded in favor of the NRC. *Critical Mass Energy Project v. NRC*, 731 F. Supp. 554 (D.D.C. 1990). In issuing this judgment, however, the trial court declined to rely on any likely impairment to the Government's information-gathering capability, deeming the effects of disclosure on the quality of the information contained in the INPO reports "an issue neither more declarations nor a parade of witnesses could definitively resolve in advance of the event." *Id.* at 557. Instead, the District Court found that

disclosure would be likely to diminish the Commission's regulatory efficiency and effectiveness.

The District Court assumed that if disclosure were required under FOIA, INPO would resist future Commission attempts to obtain access to its reports, and predicted that Commission efforts to acquire the reports by compulsory means would engender "both acrimony and some form of litigation with attendant expense and delay." *Id.* Thus, the trial court concluded that disclosure would change the relationship between the Commission and INPO from one of "collaborators in a quest for optimum industry safety" into one involving, "[i]f not outright antagonists, . . . at best . . . wary allies, working independently of one another's efforts, and mistrustful of one another's initiatives or overtures." *Id.* On the strength of this conclusion, the District Court held that the Commission's "efficiency and effectiveness would be impaired were it not permitted to honor its commitment to INPO to keep the INPO reports in confidence." *Id.* Accordingly, the trial court again found the reports to be protected from disclosure under FOIA Exemption 4, and entered summary judgment for the Commission and INPO. The present appeal ensued.

II. ANALYSIS

A. *The Impact of Disclosure Upon the Commission's Efficient Operations and Effective Execution of Its Statutory Responsibilities*

Critical Mass contends that reversal is required because the District Court had no basis upon which to hold that the Commission's "efficiency and effectiveness would be impaired were it not permitted to honor its commitment to INPO to keep the INPO reports in confidence." 731 F. Supp. at 557. We agree.

For one thing, the trial court recognized that, other than INPO's assertion that it would no longer *voluntarily* submit its reports to the Commission, the record is "largely unrevealing as to how the defendants would react to a decision render-

ing the INPO reports disclosable under FOIA." *Id.* at 556. And, as noted above, the Commission concedes that it has "ample statutory authority . . . to compel the production of the INPO reports." *Critical Mass I*, 830 F.2d at 283-84. Furthermore, on the record before us, there is no evidence whatsoever to support the District Court's holding that disclosure of the INPO reports will significantly impair the effectiveness or efficiency of the agency by virtue of anticipated antagonism in the relationship between NRC and INPO.

Whatever the ultimate disposition of this case, the Commission and INPO will still share a common goal of promoting nuclear power plant safety. Moreover, INPO, as the representative of the nuclear power industry, will continue to possess a powerful incentive to cooperate with the Commission in the pursuit of this goal. Through such concerted efforts, INPO has a first-hand opportunity to demonstrate the efficacy of industry self-regulation to the Government agency responsible for regulating nuclear power.[5]

Even were we to accept the District Court's finding that the relationship between INPO and the Commission would somehow suffer if the reports lost their confidential status, however, we could not uphold the trial court's application of Exemption 4 on this basis. In premising its summary judgment award solely on the possibility that disclosure of confidential records might create friction between a Government agency and the preparer of those records, the District Court misconstrued the type of "identifiable agency interest relating to program efficiency" upon which an Exemption 4 claim legitimately can be based.

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[5]Indeed, the interests of the Commission and INPO have been entirely in accord throughout this litigation; both parties have opposed disclosure of the INPO reports on the grounds that public access would impair their quality. If the need for limited circulation of these records is so tenuous, however, that it cannot be demonstrated, we would hardly expect INPO to jeopardize its valuable working relationship with the Commission over their disclosure.

The decision in *Critical Mass I* recognizes that the NRC might have "substantial, indeed compelling, reasons why it would choose not to exercise the coercive powers at its disposal" to require INPO to share its reports if they are not voluntarily furnished. 830 F.2d at 284 n.26. But no such "substantial" or "compelling" reasons have been shown in this case. In *Critical Mass I*, the NRC had argued that disclosability would require it to resort to its subpoena power in order to obtain INPO reports in the future. Stressing the "unavoidable delays" and "practical problems that dot the subpoena route," the Commission had claimed that these compulsory procedures were "not a reasonable alternative means for getting . . . [the] information." *Id.* at 286 n.36. The NRC now concedes that it can obtain the INPO reports by requiring nuclear plant licensees to file INPO reports with the Commission pursuant to its licensing regulations. And, the Commision has pointed to nothing in the record to indicate that use of its regulatory authority, a far less burdensome method for obtaining information than the subpoena process, is not "a reasonable alternative means" for it to acquire INPO reports (apart from possible effects on the quality of the reports). There is no evidence suggesting either that licensees would disobey regulations requiring them to submit copies of INPO reports to the Commission promptly after receiving them from INPO, or that the processing of these submissions would impose a substantial burden upon the Commission's resources.

Nor did the District Court base its decision upon any such significant impairment to the agency's efficiency interests. The only alleged "damage to some identifiable agency interest" cited by the District Court was the possibility that disclosure might spawn litigation between the Commission and INPO, along with "attendant cost and delay." Were these possible effects sufficient to justify application of Exemption 4, however, a person submitting valuable information to the Government voluntarily could dictate whether that information was confidential for purposes of FOIA; and, this third-party control could be

achieved even with respect to information that is otherwise attainable by the agency through regulation. So long as the third-party threatened to resist production of the information if it were found subject to public dissemination, the agency could base an exemption claim on alleged adverse effects to its operations that exercise of its coercive power would likely entail. By thus allowing the confidential status of information to depend entirely upon the will of the party submitting that information to the Government, we would ignore the law of this circuit holding "that the test for confidentiality is an objective one." *National Parks*, 498 F.2d at 766. We always assume that a request for confidentiality is based in part on the subjective preferences of the parties, but those preferences must be supported by objective justifications.[6]

Although our opinion in *Critical Mass I* recognizes agency interests in efficiency and effectiveness, the decision did not purport to change the law of the circuit regarding the objective test of confidentiality. Indeed, *Critical Mass I* left but a small window of opportunity to the NRC "to show, if it so [chose], that exercising its full authority [to compel disclosure of the INPO reports through] regulation would damage some identifiable agency interest relating to program effectiveness or efficiency." 830 F.2d at 287. The court surely did not mean to suggest that the agency could satisfy this test with a mere suggestion that those against whom the regulation will be enforced will be unhappy.

On the record before us, we can find no evidence to support a holding that the NRC's resort to the exercise of regulatory authority to secure the INPO reports will significantly impair "some identifiable agency interest relating

[6]Thus, we made it clear in *Critical Mass I* that, in order to prove "confidentiality" under Exemption 4, "the agency must demonstrate that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." 830 F.2d at 281 (internal quotation omitted). This is an objective test, and it is not limited by the parties' preferred means of doing business in connection with their exchange of information.

to program effectiveness or efficiency." *Critical Mass I*, 830 F.2d at 287. We therefore reverse the judgment of the District Court on this point.

B. *The Impact of Disclosure Upon the Commission's Information-Gathering Ability.*

Information will also be deemed confidential for purposes of Exemption 4 if "disclosure of the information is likely . . . to impair the Government's ability to obtain necessary information in the future." *National Parks*, 498 F.2d at 770. As noted earlier, the District Court did not premise its grant of summary judgment on this ground. Both parties, however, have addressed this possible basis for nondisclosure in their briefs and at oral argument, and so we may properly consider whether the District Court's summary judgment award could rest upon the likely impairment to the Commission's information-gathering ability. *See Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 326 (D.C. Cir.) (appellate court may affirm grant of summary judgment on ground not relied upon by lower court, provided opposing party has had fair opportunity to dispute facts material to new theory), *cert. denied*, 459 U.S. 839 (1982).

We initially note that the information contained in the INPO reports is sufficiently important to the Commission's exercise of its statutory responsibilities to be "necessary information" under *National Parks*. *See Washington Post Co.*, 690 F.2d at 268. It is true that INPO reports contain essentially the same objective data concerning safety-related incidents that the Commission already obtains directly from reports prepared by licensees.[7] However, INPO reports offer candid analyses from a diverse group of industry professionals; and many of these analyses come from persons other that those who are assigned to prepare the "official" incident reports for the NRC.

[7]Under 10 C.F.R. § 50.73 (1990), licensees must prepare and submit Licensee Event Reports ("LERs") within 30 days of discovery of any safety-related "reportable event" containing objective data concerning that event.

There can be no doubt that access to the insights of the knowledgeable INPO analysts is an invaluable benefit to the Commission in its attempts to fullfill its broad statutory mandate to promote safety in the nuclear power field.

The remainder of our inquiry is narrowly circumscribed by the concessions of the parties and the prior proceedings in this case. First, it is undisputed that, whether or not INPO reports are disclosed to the public, INPO will continue to create those reports, will prepare them with the same degree of diligence as it has in the past and will distribute them to its members. Second, the Commission has expressed confidence that it will be able to gain access to those reports from licensees, and INPO has not suggested that it can prevent its members from submitting the reports to the agency pursuant to Commission regulations. Third, the INPO reports traditionally have been widely distributed to all INPO members, to all domestic and some international nuclear utilities, to various contractors and suppliers, to persons engaged in research associated with nuclear safety, and to NRC agents and officials. The limited question before us, then, is whether the *qualitative value* of the reports would decrease if they became available to the public-at-large.

Throughout these proceedings, the Commission and INPO have argued that the confidentiality of INPO reports is critical to their accuracy and value. They note that INPO engineers base their reports largely on subjective, often self-critical, input solicited from working-level employees at the sites of the incidents under examination. The Commission and INPO argue that these employees might not speak as freely about their involvement in such incidents or offer their theories of possible causes of safety incidents if they knew such information would be more generally available to the public-at-large. As a result, these parties claim, disclosure would seriously diminish the value of the INPO reports.

We fully agree that the Commission would be justified in withholding the INPO reports if limiting their circulation were

truly necessary to maintain their quality. However, we have searched the present record in vain for any evidence that would justify such a finding.

From the evidence before us, it is unclear that the employees whose input is solicited for INPO reports either know or care about the confidential nature of their statements. As noted above, INPO reports are distributed not only to the Commission, but also to all domestic nuclear utilities, some international utilities, plant suppliers and an occasional consultant or contractor. Thus, while these records are not generally available to the public-at-large, they do receive wide distribution throughout the nuclear energy community. Moreover, employees seem perfectly willing to talk with INPO investigators even though it is understood that their comments will be reviewed by their employers and by federal regulators. Critical Mass claims that, based on the existing broad dissemination of INPO reports, whatever candor currently finds its way into the INPO reports will not be significantly reduced by the prospect that the reports might also be made available to the general public.

Responding to Critical Mass' claims, the Commission and INPO argue that nuclear plant employees are comfortable speaking candidly within the nuclear power community, where their speculations and ruminations about plant events are unlikely to be misunderstood or taken out of context. The Commission and INPO claim, however, that employees would be reluctant to talk freely if they knew that their subjective comments might publicly embarrass colleagues or cast an unfavorable light on the industry generally. We cannot determine whether the views of Critical Mass or the Commission and INPO are correct; on the present record, the effects of disclosure upon employee candor simply cannot be gauged with any degree of confidence. The record contains absolutely no testimony from working-level employees regarding the importance of confidential treatment of INPO reports to their willingness to speak to INPO analysts. In fact, the records fails

to demonstrate whether the employees interviewed by INPO analysts are even informed or aware of INPO's current limited distribution policy.[8]

The only evidence presented before the District Court on this critical point were affidavits from officials of the Commission and INPO theorizing that disclosure would be inimical to employee candor. Such self-interested speculations by officials of the entities resisting disclosure, however, are hardly the type of evidence upon which a finding of likely impairment can be based.

We therefore conclude that a genuine dispute of material fact remains concerning the effects of disclosure on the quality of INPO reports and remand to the District Court for additional proceedings directed to this question. As in *Critical Mass I*, we recognize that any finding by the District Court on this issue may admit of some uncertainty. This is not fatal to a disposition of this case, however, because the adverse effects of disclosure for purposes of Exemption 4 need not be proven with mathematical certainty. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). The District Court should review the evidence submitted by the parties and, as a trial court must do in countless other contexts, resolve material disputes of fact and offer a legal judgment based upon its factual findings, bearing in mind that the NRC carries the "burden of demonstrating that these

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[8]Nor is it entirely clear to what extent employees in fact risk exposure by speaking to INPO representatives. The reports do not identify the sources of the information on which they are based, and subjective data from interviewed employees enters the final reports only after being sifted and filtered by the analytical process through which the reports are prepared. Thus, insofar as the Commission or INPO may claim that employee fear of retaliation would inhibit frank discussion, it is unclear whether any such fear would be realistic. *But see* Transcript of Deposition of Terence J. Sullivan, *reprinted in* J.A. at 448-49 (containing the statement of INPO's Executive Vice President that, in at least some cases, an informed reader might be able to deduce the names of employees involved in reported incidents).

documents are within FOIA exemption 4," *Critical Mass I*, 830 F.2d at 281, and that the issue is one of "necessarily uncertain prediction," *id.*, at 286.

Evidence relevant to the court's inquiry would include details concerning the full extent to which INPO reports are currently circulated, to determine whether their limited confidentiality is truly maintained; testimony or affidavits from employees interviewed by INPO analysts concerning the importance of limited circulation to their willingness to speak freely; and any evidence indicating the degree to which employees are currently aware of and reasonably rely on the limited circulation of INPO reports as a prerequisite to speaking to interviewers. *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (reviewing evidence concerning effects of public disclosure upon peer reviews).

III. CONCLUSION

For the reasons stated, we reverse the judgment of the District Court and remand for further proceedings.

So ordered.

RANDOLPH, *Circuit Judge, concurring,* in which *Circuit Judge* WILLIAMS joins: Section 552(b)(4) of the Freedom of Information Act exempts from disclosure "commercial . . . information obtained from a person and . . . confidential." This is rather straightforward language. The information must be commercial and the government must have received it from another. There is no doubt that the reports INPO voluntarily provided to the Nuclear Regulatory Commission fit that description. Are they "confidential"? If ordinary usage controlled, there would also be no doubt that they were. The reports are "conveyed [and] acted on . . . in confidence" and they are "not publicly disseminated." Webster's Third International Dictionary 476 (1981).

In light of our decision in *National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974), however, it is not enough to satisfy the language of exemption four. *National Parks* added — or, as has been said, "fabricated, out of whole cloth" — an additional requirement that must be met before confidential information is exempt from disclosure. Note, *Trade Secrets and the Fifth Amendment,* 54 U. Chi. L. Rev. 334, 364 (1987). The following "objective" test must be satisfied: information qualifies for exemption as "confidential" if its disclosure would impair the government's ability to obtain necessary information in the future, or if its disclosure would place the source of information at a competitive disadvantage. *National Parks,* 498 F.2d at 770.

If this were a question of first impression, I would apply the common meaning of "confidential" and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court. I see no legitimate basis for a court's adding some two-pronged "objective" test relating to the government's need for the data and the consequences of destroying its confidential nature. Information not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than objectively measurable harm. In business affairs

as in personal affairs, there are many things people simply prefer to keep to themselves or to reveal to others only on a confidential basis. In applying exemption four, some courts have asked whether "disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 9 (1st Cir. 1983). The "interests" are then defined, as in *National Parks*, as agency efficiency or competitive injury. But the "specific interest," indeed the only interest, apparent in the statutory language is confidentiality and that interest is necessarily harmed by disclosure. The argument against this is that parties, by designating the information they provide as confidential, would wind up controlling whether it is publicly revealed. One may reasonably ask what is wrong with such a system. Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 195-202 (1977). At any rate, the argument is one of legislative policy. It is not based on any ambiguity in the language of the statute. *See West Virginia Univ. Hosps., Inc. v. Casey*, 59 U.S.L.W. 4180, 4184-85 (U.S. Mar. 19, 1991); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

I am, however, not at liberty to follow the common sense meaning of exemption four. This court has endorsed the *National Parks* definition many times, and it was applied by the first panel in this case. *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 282 (D.C. Cir. 1987). I am thus bound not only by the law of the circuit, but also by the law of the case, which also prevents me from following Judge Buckley's persuasive dissent in *Critical Mass I* arguing that the *National Parks* test should not be further extended to force disclosure if the government's "future ability to obtain necessary information *on a voluntary basis*" would be impaired, as it surely will be in this case. 830 F.2d at 288 (emphasis in original). In view of these contraints, and the fact that the decision here does not expand upon *National Parks*, I concur.

FILED
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1990

No. 90-5120

CRITICAL MASS ENERGY PROJECT,
Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

(Civil No. 84-01943)

O R D E R

The Suggestions For Rehearing *En Banc* and appellant's response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular, active service voted in favor of the suggestions. Accordingly, it is

ORDERED, by the Court *en banc,* that the suggestions are granted and this case will be considered and decided by the Court sitting *en banc.* It is

FURTHER ORDERED, by the Court *en banc,* that the judgment of the panel filed on April 30, 1991 be, and the same hereby is, vacated.

A future order will govern further proceedings.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

By: Robert A. Bonner
Deputy Clerk